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RECORD, CASE No. 14,770.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 1296.

JAMES A. SIMMONS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 24, 1891.

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1 To the honorable the Supreme Court of the United States:

James A. Simmons, petitioning this honorable court, complains that a manifest error hath happened, to his great damage, in the record and proceedings and in the rendition of a judgment of a plea in the trial of the issue joined between the United States and him, the said James A. Simmons, in the circuit court for the southern district of New York, in that the jury first empaneled to try the issue aforesaid were discharged before verdict — given and the petitioner again placed on trial before a second jury, and in that certain evidence was improperly admitted and other evidence improperly excluded in the trial of said issue, and in that there was improper matter in the charge of the judge to the jury; and the said James A. Simmons therefore prays that a writ of error may be allowed, addressed to the honorable judges of the said circuit court, so that the said record and proceedings may be sent to the Supreme Court of the United States, that therein may be done what of right should be done to correct said error.

RICHARD S. NEWCOMBE,
JOHN J. JOYCE,
Attorneys for Petitioner, James A. Simmons.

New York, June 26th, 1891.

2 Endorsed: Petition of James A. Simmons for the allowance of a writ of error. U. S. circuit court. Filed June 26, 1891. John A. Shields, clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between The United States of America, plaintiff, and James A. Simmons, defendant, manifest errors have happened, to the great damage of the said defendant, James A. Simmons, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-fourth day of July next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 26th day of June, in the year
4 of our Lord one thousand eight hundred and ninety-one.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York.

This writ is to operate as a supersedeas and stay of execution. Allowed by—

CHAS. L. BENEDICT, *Judge.*

RICHARD S. NEWCOMBE & JOHN J. JOYCE,
Attorneys for James A. Simmons, 96 Broadway, New York City.

5 [Endorsed:] United States Supreme Court. James A. Simmons, pl'ff in error, *vs.* United States of America, def't in error. Writ of error to the United States circuit court for the southern district of New York. Service of a copy of the within writ acknowledged this 26th day of June, 1891. Edward Mitchell, U. S. attorney.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from six (6) to one hundred and twenty-six (126), inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The United States of America, defendant in error, *ads.* James A. Simmons, plaintiff in error, as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 23 day of July, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and sixteenth.

JOHN A. SHIELDS, *Clerk.*

6 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the third Wednesday of June, in the year of our Lord one thousand eight hundred and ninety, and continued by adjournment to and including the seventh day of Oc-

tober, in the year of our Lord one thousand eight hundred and ninety.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid on their oath present that Peter J. Claassen, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-third day of January, in the year of our Lord one thousand eight hundred and ninety, at the southern district of New York and
7 within the jurisdiction of this court, he, the said Peter J. Claassen, being then and there the president of a certain national banking association then and there known and designated as the Sixth National Bank of the City of New York, which said association had been theretofore created and organized under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business at the city of New York, in the said district, under the said act of Congress and acts amendatory thereof, did, by virtue of his said office and employment and while he was so employed and acting as such president as aforesaid, receive and take into his possession certain funds and credits, to wit:

Ten bonds and written obligations of the Saint Louis and San Francisco Railway Company of the kind called general mortgage bonds of the denomination and value of one thousand dollars each.

Thirty-one bonds and written obligations of the New York Elevated Railroad Company of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Fifteen bonds and written obligations of the Canada Southern Railway Company of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Twenty bonds and written obligations of the Chicago, Milwaukee and Saint Paul Railway Company of the kind called terminal bonds of the denomination and value of one thousand dollars each.

Twenty bonds and written obligations of the Chicago, Milwaukee and Saint Paul Railway Company of the kind called consolidated bonds of the denomination and value of one thousand dollars each.

Thirty bonds and written obligations of the Milwaukee and Saint Paul Railway Company of the kind called consolidated bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Milwaukee and Saint Paul Railway Company of the kind called La Crosse Division bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Spokane Falls and Northern railroad of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Sixty bonds and written obligations of the Union Pacific Railway

Company of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Fifty-five bonds and written obligations of the Metropolitan Elevated Railway Company of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Fifteen bonds and written obligations of the Central Pacific Railway Company of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Forty-six bonds and written obligations of the Union Pacific Railway Company of the kind called collateral trust bonds of the denomination and value of one thousand dollars each.

8 Ten bonds and written obligations of the Cœur de Alene Railway Company and Navigation Company of the kind called general first-mortgage bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Saint Paul and Sioux City railroad of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Twenty-five bonds and written obligations of the Central Pacific Railway, San Joaquin Railroad Company, of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Saint Paul, Minneapolis and Manitoba Railway Company of the kind called second-mortgage bonds of the denomination and value of one thousand dollars each.

Twenty-five bonds and written obligations of the Chicago, Burlington and Quincy Railroad Company of the kind called sinking-fund bonds of the denomination and value of one thousand dollars each.

Forty-six bonds and written obligations of the Chicago and Northwestern Railway Company of the kind called debenture bonds of the denomination and value of one thousand dollars each.

Sixty bonds and written obligations of the Chicago, Burlington and Quincy Railroad Company of the kind called debenture bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Lake Shore and Michigan Southern Railway Company of the kind called second-mortgage bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Chicago and Northwestern Railway Company of the kind called gold first-mortgage bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the New York, Lake Erie and Western Railway Company of the kind called funded bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Chicago, Saint Paul, Minneapolis and Omaha Railway Company of the kind called second-mortgage bonds of the denomination and value of one thousand dollars each.

Five bonds and written obligations of the Burlington, Cedar Rapids and Northern Railway Company of the kind called first-

mortgage bonds of the denomination and value of one thousand dollars each.

Four bonds and written obligations of the Texas Pacific Railway Company of the kind called second-mortgage bonds of the denomination and value of one thousand dollars each.

Forty-five bonds and written obligations of the Oregon Short Line Railway Company of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Louisville, New Albany and Chicago Railway Company of the kind called first-mortgage bonds of the denomination and value of one thousand dollars each.

Ten bonds and written obligations of the Richmond and West Point Terminal Railway and Warehouse Company of the kind called consolidated first-mortgage gold trust bonds of the denomination and value of one thousand dollars each, then and there being the property of the said association and which he held for and in the name and on account of the said association, and did then and there, wilfully and unlawfully and with intent to injure and defraud the said association, embezzle the said bonds and written obligations and convert them to his own use, against the peace of the United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

9 And the jurors aforesaid, upon their oath aforesaid, do further present that James A. Simmons, late of the city and county of New York, in the district and circuit aforesaid, was then and there present, unlawfully and wilfully and with like intent aiding, abetting, counseling, and procuring the said Peter J. Claassen to commit the offense aforesaid in manner and form aforesaid, he, the said James A. Simmons, then and there well knowing the said Peter J. Claassen to be then and there the president of the said association as aforesaid, with the intent then and there on the part of him, the said James A. Simmons, to injure and defraud the said association, against the peace of the United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

10 *Second Count.*

And the jurors aforesaid, on their oath aforesaid, do further present that Peter J. Claassen, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety, at the southern district of New York and within the jurisdiction of this court, being then and there the president of a certain national banking association then and there known and designated as the Sixth National Bank of the City of New York, which said association had been theretofore created and organized under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption

thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business at the city of New York, in the said district, under the said act of Congress and acts amendatory thereof, did, wilfully and unlawfully and with intent to injure and defraud the said association, misapply and convert to the use, benefit, and advantage of one James A. Simmons certain moneys and funds then and there being the property of the said association, to wit, the sum of sixty thousand dollars, in the manner and by the means following—that is to say: He, the said Peter J. Claassen, being then and there such president as aforesaid, did, without the knowledge and consent of said association or its board of directors, procure the making by one Andrew E. Colson, who was then and there the cashier of said association, of a certain writing and check, commonly known and called a cashier's check, bearing date the twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety, which said check did then and there authorize and direct the said association to pay to the order of the said James A. Simmons the sum of sixty thousand dollars, although, as he, the said Peter J. Claassen, then and there well knew, the said sum of sixty thousand dollars was not then and there on deposit with the said association to the credit of him, the said James A. Simmons, and was not then and there due and owing from the said association to him, the said James A. Simmons, and the repayment thereof to the said association was not then and there in any way secured, and the said James A. Simmons had no manner of right and title to the same, and he, the said Peter J. Claassen, then and there unlawfully devising and intending that he, the said James A. Simmons, should appropriate and convert to his own use the said sum of sixty thousand dollars from and out of the moneys and funds of the said association, which said sum of money was, upon and pursuant to the direction and authorization contained in the said check, thereafter, to wit, on the twenty-third day of January, in the year of our Lord one thousand eight hundred and ninety, paid by the said association from and out of the moneys and funds of the said association to the said James A. Simmons, and was then and there appropriated and converted to the use of the said James A. Simmons, against the peace of the United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

11 And the jurors aforesaid, upon their oath aforesaid, do further present that James A. Simmons, late of the city and county of New York, in the district and circuit aforesaid, was at the place and at all the times hereinbefore mentioned present, unlawfully and wilfully and with like intent aiding, abetting, counseling, and procuring the said Peter J. Claassen to commit the offense aforesaid in manner and form as aforesaid, he, the said James A. Simmons, then and there well knowing the said Peter J. Claassen to be then and there the president of the said association as aforesaid, with the intent then and there on the part of him, the said James A. Simmons, to injure and defraud the said association, against the peace of the

United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

12 *Third Count.*

And the jurors aforesaid, on their oath aforesaid, do further present that Peter J. Claassen, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety, at the southern district of New York and within the jurisdiction of this court, being then and there the president of a certain national banking association then and there known and designated as the Sixth National Bank of the City of New York, which said association had been theretofore created and organized under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business at the city of New York, in the said district, under the said act of Congress and acts amendatory thereof, did, wilfully and unlawfully and with intent to injure and defraud the said association, misapply and convert to the use, benefit, and advantage of a certain copartnership, composed of William M. Kilduff and Charles E. Wallack, then and there carrying on business under the name and style of Pell, Wallack and Company, certain moneys and funds then and there being the property of the said association, to wit, the sum of sixty thousand dollars, in the manner and by the means following—that is to say: He, the said Peter J. Claassen, being then and there such president as aforesaid, did, without the knowledge and consent of said association or its board of directors, procure the making by one Andrew E. Colson, who was then and there the cashier of said association, of a certain writing and check, commonly known and called a cashier's check, bearing date the twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety, which said check did then and there authorize and direct the said association to pay to the order of the said copartnership the sum of sixty thousand dollars, although, as he, the said Peter J. Claassen, then and there well knew, the said sum of sixty thousand dollars was not then and there on deposit with the said association to the credit of the said copartnership and was not then and there due and owing from said association to the said copartnership, and the repayment thereof to the said association was not then and there in any way secured, and the said copartnership had no manner of right and title to the same, and he, the said Peter J. Claassen, then and there unlawfully devising and intending that the said copartnership should appropriate and convert to its own use the said sum of sixty thousand dollars from and out of the moneys and funds of the said association, which said sum of money was, upon and pursuant to the direction and authorization contained in said check, thereafter, to wit, on the

twenty-third day of January, in the year of our Lord one thousand eight hundred and ninety, paid by the said association from and out of the moneys and funds of the said association to the said copartnership, and was then and there appropriated and converted to the use of the said copartnership, against the peace of the United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

13 And the jurors aforesaid, upon their oath aforesaid, do further present that James A. Simmons, late of the city and county of New York, in the district and circuit aforesaid, was at the place and at all the times hereinbefore mentioned present, unlawfully and wilfully and with like intent aiding, abetting, counseling, and procuring the said Peter J. Claassen to commit the offense aforesaid in manner and form as aforesaid, he, the said James A. Simmons, then and there well knowing the said Peter J. Claassen to be then and there the president of the said association as aforesaid, with the intent then and there on the part of him, the said James A. Simmons, to injure and defraud the said association, against the peace of the United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

14 *Fourth Count.*

And the jurors aforesaid, on their oath aforesaid, do further present that Peter J. Claassen, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety, at the southern district of New York and within the jurisdiction of this court, being then and there the president of a certain national banking association then and there known and designated as the Sixth National Bank of the City of New York, which said association had been theretofore created and organized under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business at the city of New York, in the said district, under the said act of Congress and acts amendatory thereof, did, wilfully and unlawfully and with intent to injure and defraud the said association, misapply and convert to the use, benefit, and advantage of a certain copartnership, composed of John Satterlee and James A. Simmons, then and there carrying on business under the name and style of John Satterlee and Company, certain moneys and funds then and there being the property of the said association, to wit, the sum of sixty thousand dollars, in the manner and by the means following—that is to say: He, the said Peter J. Claassen, being then and there such president as aforesaid, did, without the knowledge and consent of said association or its board of directors, procure the making by one Andrew E. Colson, who was then and there the cashier of said association, of

a certain writing and check, commonly known and called a cashier's check, bearing date the twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety, which said check did then and there authorize and direct the said association to pay to the order of the said copartnership the sum of sixty thousand dollars, although, as he, the said Peter J. Claassen, then and there well knew, the said sum of sixty thousand dollars was not then and there on deposit with the said association to the credit of the said copartnership and was not then and there due and owing from said association to the said copartnership, and the repayment thereof to the said association was not then and there in any way secured, and the said copartnership had no manner of right and title to the same, and he, the said Peter J. Claassen, then and there unlawfully devising and intending that the said copartnership should appropriate and convert to its own use the said sum of sixty thousand dollars from and out of the moneys and funds of the said association, which said sum of money was, upon and pursuant to the direction and authorization contained in said check, thereafter, to wit, on the twenty-third day of January, in the year of our Lord one thousand eight hundred and ninety, paid by the said association from and out of the moneys and funds of the said association to the said copartnership, and was then and there appropriated and converted to the use of the said copartnership, against the peace of the United States and their dignity and contrary to the form of the statute of the said United States and their dignity and contrary to the form of the statute of the said United States in such — made and provided.

15 And the jurors aforesaid, upon their oath aforesaid, do further present that James A. Simmons, late of the city and county of New York, in the district and circuit aforesaid, was at the place and at all times hereinbefore mentioned present, unlawfully and wilfully and with like intent aiding, abetting, counseling, and procuring the said Peter J. Claassen to commit the offense aforesaid in manner and form as aforesaid, he, the said James A. Simmons, then and there well knowing the said Peter J. Claassen to be then and there the president of the said association as aforesaid, with the intent then and there on the part of him, the said James A. Simmons, to injure and defraud the said association, against the peace of the United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

16 *Sixth Count.*

And the jurors aforesaid, on their oath aforesaid, do further present that Peter J. Claassen, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and ninety, at the southern district of New York and within the jurisdiction of this court, being then and there the president of a certain national banking association then and there known and designated as the Sixth National Bank of the City of New York, which said association had been theretofore created and organized under and by virtue of an act of Congress entitled

"An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business at the city of New York, in the said district, under the said act of Congress and acts amendatory thereof, did, wilfully and unlawfully and with intent to injure and defraud the said association, misapply and convert to the use, benefit, and advantage of a certain banking corporation then and there known and designated as the Lenox Hill bank, which said banking corporation had been theretofore created and organized under and by virtue of the laws of the State of New York and was then and there acting and carrying on a banking business at the city of New York, in the said district, certain moneys and funds then and there being the property of the said Sixth National Bank of the City of New York, to wit, the sum of two hundred and seven thousand eight hundred dollars, in the manner and by the means following—that is to say, that he, the said Peter J. Claassen, as such president as aforesaid, did, without the knowledge and consent of the said Sixth National Bank of the City of New York and without the knowledge and consent of the board of directors thereof, then and there cause to be paid at the New York Clearing-House Association to and upon divers checks and written orders for the payment of money made and drawn upon the said Lenox Hill bank by divers persons to the jurors aforesaid as yet unknown and then and there presented for payment at the said New York Clearing-House Association by divers banking corporations then and there being members of the said New York Clearing-House Association, a more particular description of which said divers banking corporations is to the jurors aforesaid as yet unknown, the said sum of two hundred and seven thousand eight hundred dollars, he, the said Peter J. Claassen, then and there well knowing that the said Sixth National Bank of the City of New York was then and there the clearing-house agent of the said Lenox Hill bank at the said New York Clearing-House Association, which said sum so paid as aforesaid, as he, the said Peter J. Claassen, then and there well knew, was in excess of all sums and amounts which the said Lenox Hill bank was then and there entitled to have paid out of the moneys and funds of the said Sixth National Bank of the City of New York, he, the said Peter J. Claassen, then and there unlawfully, wickedly, and fraudulently devising and intending that the said sum of two hundred and seven thousand eight hundred dollars should be, and the same then and there was, appropriated and converted to the use, benefit, and advantage of the said Lenox Hill bank, although, as he, the said Peter J. Claassen, then and there well knew, the said sum of two hundred and seven thousand eight hundred dollars so paid as aforesaid had not been deposited and was not then on deposit with the said
17 Sixth National Bank of the City of New York by the said Lenox Hill bank and was not then and there due and owing from the said Sixth National Bank of the City of New York to the said Lenox Hill bank, and the repayment thereof to the said Sixth

National Bank of the City of New York was not then and there in any way secured, and the said Lenox Hill bank had no manner of right or title to the same, against the peace of the United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

18 And the jurors aforesaid, upon their oath aforesaid, do further present that James A. Simmons, late of the city and county of New York, in the district and circuit aforesaid, was then and there present, unlawfully and wilfully and with like intent aiding, abetting, counseling, and procuring the said Peter J. Claassen to commit the offense aforesaid in manner and form as aforesaid, he, the said James A. Simmons, then and there well knowing the said Peter J. Claassen to be then and there the president of the said association as aforesaid, with the intent then and there on the part of him, the said James A. Simmons, to injure and defraud the said association, against the peace of the United States and their dignity and contrary to the form of the statute of the said United States in such case made and provided.

EDWARD MITCHELL,
United States Attorney.

19 [Endorsed:] U. S. circuit court. The United States of America *vs.* James A. Simmons. Indictment. U. S. Rev. St., § 5209. Edward Mitchell, U. S. district attorney. A true bill. Cornelius N. Bliss, foreman. Filed in court October 7, 1890.

[Endorsed:] Filed in open court the 7th Oct., 1890. Oct. 13, 1890, the defendant arraigned and indict. read. Def't pleads not guilty, with l. to withd. by 13th. 1891, Feb. 13, jury empanelled; M'ch 11, trial concluded; M'ch 11, verdict guilty. June 26, 1891, sentence, six (6) years' imprisonment, sentence to be executed at the Erie county penitentiary.

At a circuit court of the United States for the second circuit and southern district of New York, begun on the — day of ——, in the year one thousand eight hundred and eighty–, and continued, by adjournment, to and including the — day of ——, in the year one thousand eight hundred and eighty–, and on the day last aforesaid, at the city of New York, in the district and circuit aforesaid.

Present: The Hon. Charles L. Benedict, judge.

THE UNITED STATES
against
—— ——.

A bill of indictment having been presented against the said defendant by the grand jurors of said district in manner and form hereinbefore set forth, and the said cause having been duly tried by a jury at a circuit court of the United States for the district and circuit aforesaid, begun on the — day of ——, in the year one thousand eight hundred and eighty–, and the jury aforesaid having found therein a verdict of "guilty," and the defendant having been heretofore remanded to await the sentence of the court, now, on

motion of Edward Mitchell, Esq., United States attorney for the southern district of New York, the defendant being here present in court, it is ordered that the said defendant be imprisoned in —— for the term of ——, and that he pay a fine of —— dollars; and it is further ordered that the fine aforesaid be forthwith docketed as a judgment of this court.

20 U. S. Circuit Court, Southern District of New York.

In the Matter of the Continuation of the Present Term of This Court.

Ordered that the present term of this court be continued for the purpose of the trial of this cause of the United States *vs.* James A. Simmons, now in progress, and that the said term be continued until the trial of the said cause is finished.

March 10, 1891.

CHAS. L. BENEDICT.

Endorsed: *In re* continuation of term of court as to trial of United States *vs.* James A. Simmons. Order continuing term. Filed in court March 10, 1891.

21 At a stated term of the circuit court of the United States of America for the southern district of New York in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the eleventh day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable Charles L. Benedict, judge.

THE UNITED STATES
vs.
JAMES A. SIMMONS. } § 5209.

The above cause being still on trial the jurors are called and severally answer to their names.

The jury thereupon say that they find the defendant guilty of the charges in the first count of the indictment contained and not guilty of the charges in the other four counts of the indictment contained, and so say they all; and they further recommend the defendant to the mercy of the court.

On motion of defendant's counsel, ordered that the jury be polled, and on being severally polled they say that that is their verdict, and so say they all.

On motion of the U. S. attorney, ordered that the defendant be remanded to the custody of the U. S. marshal.

22 MONDAY, *May 25th*, 1891.

The court meets pursuant to adjournment and is opened by proclamation.

Present: Hon. Charles L. Benedict, judge.

THE UNITED STATES
vs.
JAMES A. SIMMONS.

A proposed bill of exceptions having been presented in the above cause, the United States attorney moves that the same be not settled or allowed on the ground that there is no provision of law for a bill of exceptions.

Mr. Edward Mitchell, U. S. attorney, is heard in support of motion.

Mr. John J. Joyce is heard in behalf of defendant.

(Briefs to be submitted.)

23 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States circuit court rooms, in the post-office building, in the city of New York, on the 1st day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable Charles L. Benedict, circuit judge.

UNITED STATES OF AMERICA
against
JAMES A. SIMMONS.

The defendant herein having presented for settlement to the Hon. Charles L. Benedict upon the 25th day of May, 1891, a bill of exceptions herein, and the United States having moved, by Edward Mitchell, its attorney for the southern district of New York, that said bill of exceptions should be disallowed upon the ground that there was no provision of law authorizing the same:

Now, after hearing Edward Mitchell, U. S. attorney for the southern district of New York, in behalf of said motion and John J. Joyce in opposition thereto, and due deliberation having been had, it is—

Ordered that said motion by the United States to suppress said bill of exceptions be, and the same hereby is, denied.

CHAS. L. BENEDICT.

Endorsed: U. S. circuit court. Filed Jun- 2, 1891. John A. Shields, clerk.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the twenty-sixth day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The Honorable Charles L. Benedict, judge.

THE UNITED STATES
vs.
JAMES A. SIMMONS. } § 5209.

On motion of the United States attorney, ordered sentence.

The court thereupon proceeds to pass judgment and sentence the

prisoner, James A. Simmons, to be imprisoned for a period of six (6) years.

Sentence to be executed at the Erie county penitentiary.

25 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA
vs.
JAMES A. SIMMONS.
} Bill of Exceptions.

Afterwards, to wit, at a circuit court held in the city of New York in and for the southern district of New York, on the twenty-sixth day of January, in the year A. D. 1891, before the Hon. Charles L. Benedict, one of the judges appointed to hold the said circuit court according to the form of the statute in such case made and provided, the aforesaid issue so joined between the said parties as aforesaid came on to be tried by a jury of the district aforesaid; at which time came there as well the said United States of America as the said defendant, by their respective attorneys, and the jurors of the jury aforesaid empanelled to try the said issue, being called, also came and were then and there in due manner chosen and sworn to try the said issue; and thereupon the attorney of the United States opened the case to the said jury, and thereafter, to maintain the said issue, the said United States on its part called a number of witnesses, who were duly sworn and examined on behalf of the said United States to maintain and prove the said issue on its part, and which said witnesses the counsel for the said defendant, to
26 maintain and prove the said issue on his part, then and there cross-examined; and thereafter, to wit, on the ninth day of February, 1891, the following proceedings were had:

Edward Mitchell, the attorney of the United States, moved the court as follows:

"I move on the minutes and on the affidavits submitted to withdraw a juror for the reason that, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." Whereupon the said attorney read the following affidavits:

United States Circuit Court, Southern District of New York.

THE UNITED STATES
vs.
JAMES A. SIMMONS.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Edward Mitchell, being duly sworn, deposes and says as follows: That he is the attorney of the United States for the southern district of New York; that on the 6th day of February he received from Charles M. Ward his affidavit made on that day and hereto annexed; that on the same day he received the affidavit of William

P. Cherry, which is also hereto annexed; that said affidavits
27 were exhibited to one of the counsel for the defendant and to the judge presiding at the trial before the sitting of the court on that day; that thereafter the court was opened, and adjourned until the 9th day of February; on the 6th day of February, at about 5 p. m., deponent received from Richard S. Newcombe a letter, a copy of which is hereunto annexed; that on the 7th day of February the New York Herald, a daily newspaper printed in the city of New York, published what purports to be and is substantially a copy of said letter, a copy of which publication is hereto annexed; that the substance of or extracts from said letter was also published in other newspapers in the city of New York; that on the morning of the 7th of February William Goodnow, the eleventh juror in the above-entitled case and the person mentioned in said letter, called at this deponent's office and requested to see this deponent, which request deponent declined to comply with.

EDW. MITCHELL.

Subscribed and sworn to before me this 9th day of February, A. D. 1891.

HENRY I. THORNTON,
Notary Public, City and County of New York.

The following is a copy of Mr. Newcombe's letter referred to in the foregoing affidavit:

28 Donohue, Newcombe & Cardozo, counsellors-at-law, 96 Broadway.

Chas. Donohue. Rich'd S. Newcombe. Albert Cardozo, Jr.

NEW YORK, *Feb'y 6th*, 1891.

Honorable Edward Mitchell, United States district attorney, southern district of New York:

MY DEAR SIR: Since leaving your office, after adjournment of the trial of the Simmons indictment, I received a visit from a representative of the New York Herald, Mr. Folsom, who informed me that one of the assistants in your office in effect informed him that the postponement of the trial was due to information communicated to you tending to affect one of the members of the jury, and that it is the intention of that paper to publish that fact in to-morrow's issue.

You must, of course, appreciate that such a publication cannot but tend to seriously affect my client's interests unless it be accompanied with such an explanation as the facts warrant.

Hence I write you this letter, copies of which I shall at the same time send to the press of this city. That there may be no room for a mistake, I understand the following to be the facts: This morning a gentleman by the name of Charles Ward, claiming to be a broker carrying on business at 132 Park avenue, called upon you

and stated that he yesterday visited the court-room, there rec-
29 ognized Mr. James A. Simmons as a person who had occupied rooms "A" and "B" at Nos. 165 and 167 Broadway during the year 1884; that he recognized Mr. William E. Goodnow, the 11th juror, as a gentleman who during a part of the same period had occupied room "C" in the same building for a period of three or four months; that room "C" adjoined room "B," occupied by Mr. Simmons, and that he had several times seen Mr. Simmons in conversation with Mr. Goodnow between the months of January and May, 1884, in some part of 165 Broadway. You thereupon called my attention to the examination of Mr. Goodnow before he was accepted as a juror, in which he declared that he did not know Mr. Simmons, and to his knowledge had never spoken to or seen him.

Immediately upon your giving me that information I stated the facts described by your informant to Mr. Simmons. He most positively declared that he did not know, and to his knowledge had never seen, Mr. Goodnow or spoken to him; that if Mr. Goodnow ever occupied room "C" in the building 165 Broadway in the early part of 1884 that he, Mr. Simmons, had no knowledge whatever upon the subject.

Under this condition of affairs the trial of the cause was postponed until next Monday, and I agreed with you to bring Mr. Simmons with me to your private office for the purpose of your interrogating him upon this subject.

I brought him and there met the informer. It there appeared from the informer's statements to you in our presence that a quarrel had taken place between him and Mr. Simmons either in
30 1884 or 1885, and it also became evident that the information he gave you was given with the evident purpose of injuring Mr. Simmons. I then requested you to retain possession of the informer's affidavit, and now publicly request you so to do, with an assurance that at the termination of this trial the truth or falsity of the informer's information shall be inquired into either by the grand jury or a committing magistrate.

I have carefully investigated the subject myself, and am perfectly confident that Mr. Goodnow honestly and truthfully declared on oath that he did not know Mr. Simmons, and I am equally confident that Mr. Simmons' declaration to you and to me was a truthful declaration; that he did not know Mr. Goodnow, and that, to his knowledge, he had never held any conversation or communication with him.

Of course I cannot shut my eyes to the fact that if there is the slightest foundation for the informer's oath to you, that there is or was any intimacy existing between Mr. Goodnow and Mr. Simmons, that such a fact will necessarily operate to my client's prejudice. If, on the other hand, the informer has, as I believe, falsely made the statement referred to, it will not, in my opinion, have any effect upon the mind either of Mr. Goodnow or any other member of the jury.

It is not a little surprising to me that the informer, after a lapse of nearly seven years, is able to-day to state that he accidentally

saw Mr. Goodnow and Mr. Simmons consulting with each other in any of the corridors of that public building at that time.

31 I shall be ready to proceed with the trial of this cause on Monday, unless some more reasonable ground is urged than what I believe to be the false and malicious charge by a person confessedly entertaining ill-will towards Mr. Simmons.

I am now engaged in inquiring into the character, surroundings, and antecedents of the informer, Charles Ward, and shall be glad to submit the result of my investigation as soon as I am in receipt of the same.

I am, my dear sir, regretting exceedingly this unfortunate occurrence, with assurances of respect,

Yours very faithfully, RICHARD S. NEWCOMBE.

The foregoing communication meets with the approval of my associates.

The following is a copy of the publication in the New York Herald referred to in the affidavit of Mr. Mitchell:

Does Simmons know Juror No. 11?

The trial of the bank-wrecker stopped upon information given by Broker Charles Ward.

Mr. Newcombe's sharp letter.

He casts discredit upon the informant's sworn statement and declares his client is unknown to Mr. Goodnow.

32 May compel a new trial.

The trial of the case against James A. Simmons, the bank-wrecker, in the United States court yesterday was suddenly adjourned by Judge Benedict until Monday. The air was thick with mystery. The announcement of the adjournment was made from the bench after the audience and witnesses had been kept waiting an hour and a half. No explanation was given, and counsel for the defense and the United States district attorney and his assistants declined to talk about it.

The only statement which Judge Benedict would make was this formal one in dismissing the attendants and jurors:

"In regard to the trial of Simmons, circumstances have come to my knowledge to-day which renders it my duty to adjourn the case."

With this information ceased. However, through the cloud of mystery loomed up a grave charge against the good faith of the defense. The jury, which was selected with so much care, was declared to be worthless, inasmuch as one man in it was said to be acquainted with and friendly to the defendant. The integrity of the entire proceedings was impeached.

Mr. Ward's affidavit.

When the jury was selected, on January 28, it was believed by the prosecution, as well as by the defense, to be eminently satisfactory. Great efforts had been made to obtain men of intelligence who were absolutely unprejudiced.

33 The trial progressed for a few days and was to resume at the usual time yesterday morning, when a neatly dressed man, who gave his name as Charles Ward, of No. 132 Park avenue, sent in his card marked "important" to Mr. Mitchell. The district attorney and the stranger were closeted together for some time, and before leaving Ward left with the district attorney an affidavit to the effect that the eleventh juror, Mr. William Goodnow, of No. 171 Broadway, a broker, was acquainted with the defendant. Ward particularized the occasions on which he had seen the two together, though he admitted that he knew of no meetings between them since 1884—seven years ago.

Mr. Mitchell submitted the affidavit at once to Judge Benedict, who was greatly surprised and held a consultation of nearly three-quarters of an hour with Mr. Mitchell, his assistant, Mr. Mott, and their associate in the prosecution, ex-District Attorney Rose. It was agreed that the charge was a grave one and should be immediately placed before the defendant's counsel for explanation.

Messrs. Richard S. Newcombe and Charles A. Hess, Simmons' lawyers, were awaiting the coming of Judge Benedict in the court-room. They were summoned, and they, too, appeared greatly surprised and mortified at Ward's affidavit. "If this is true," exclaimed Mr. Newcombe, "I shall wash my hands of this case. I believe, however, that Mr. Simmons does not know Mr. Goodnow and has never seen him before. I shall ask him."

34 Mr. Newcombe went back to the court-room and held an energetic conversation with his client, but Simmons' reply invariably was: "I don't know the man. I do not remember to have ever seen him."

Mr. Mott dropped a little hint.

It was then agreed that an investigation should be made of Ward's charges, and that pending it absolute secrecy should be maintained.

After the adjournment I saw Assistant District Attorney Mott, and upon inquiring from him the reasons for the adjournment was met by an emphatic refusal to talk about it. Upon my suggesting that it was exceedingly unusual for an adjournment to be made the subject of so much secrecy Mr. Mott replied:

"Not necessarily. I could mention a number of reasons for the court and counsel so acting. For instance, suppose"—then Mr. Mott hesitated and continued, laughing: "Of course this is not the reason in point, but it will do as an illustration. Suppose the court had reason to believe that the jury was not trustworthy, and he desired time before continuing the case to ascertain the accuracy of

his information, wouldn't he be justified in the course he has pursued in the present case?"

I acknowledged this, and by a word dropped here and there during the brief ensuing conversation inferred that Mr. Mott's supposititious case was the actual one.

The information which was secured from Mr. Mott I sub-
35 mitted to Mr. Charles A. Hess, who was disposed to deny that the adjournment was in any way related to the trustworthiness of the jury. He acknowledged, however, that detectives were employed in charges which had been made which, were they proved, would seriously damage the standong of his client before the court.

Then Mr. Newcombe got angry.

When I saw Mr. Newcombe he, like the others, refused to converse about the case, but when I informed him of my conversation with Mr. Mott he at once wrote the following letter to Mr. Mitchell and sent it, receiving word by messenger that there was no answer:

"Edward Mitchell, United States district attorney, southern district of New York.

"My Dear Sir: Since leaving your office after the adjournment of the trial of the Simmons indictment I received a visit from a representative of the New York Herald, who informed me that one of the assistants in your office in effect informed him that the postponement of the trial was due to the information communicated to you tending to affect one of the members of the jury, and that it is the intention of that paper to publish that fact in to-morrow's issue.

"You must of course appreciate that such a publication cannot but tend to seriously affect my client's interests unless it be accompanied with such an explanation as the facts warrant; hence I write you this letter.

36 "That there may be no room for mistake I understand the following to be the facts:

"Mr. Ward's allegations.

"This morning a gentleman by the name of Charles Ward, claiming to be a broker carrying on business at No. 132 Park avenue, called upon you and stated that he yesterday visited the court-room; there recognized Mr. James A. Simmons as a person who had occupied rooms A and B at Nos. 165 and 167 Broadway during the year 1884; that he recognized Mr. William E. Goodnow, the eleventh juror, as a gentleman who, during a part of the same period, had occupied room C in the same building for a period of three or four months; that room C adjoining room B, occupied by Mr. Simmons, and that he had several times seen Mr. Simmons in conversation with Mr. Goodnow between the months of January and May, 1884, in some part of No. 165 Broadway.

"You thereupon called my attention to the examination of Mr. Goodnow before he was accepted as a juror, in which he declared

that he did not know Mr. Simmons and to his knowledge had never spoken to or seen him.

"Immediately upon your giving me that information I stated the facts described by your informant to Mr. Simmons. He most positively declared that he did not know and to his knowledge had never seen Mr. Goodnow or spoken to him; that if Mr. Goodnow occupied room C in the building No. 165 Broadway in the early part of 1884 that he, Mr. Simmons, had no knowledge whatever upon the subject.

37 "Face to face with the 'informer.'

"Under this condition of affairs the trial of the cause was postponed until next Monday, and I agreed with you to bring Mr. Simmons with me to your private office for the purpose of your interrogating him upon this subject.

"I brought him, and there met the informer. It there appeared, from the informer's statements to you in our presence, that a quarrel had taken place between him and Mr. Simmons either in 1884 or 1885, and it also became evident that the information he gave you was given with the evident purpose of injuring Mr. Simmons.

"I then requested you to retain possession of the informer's affidavit, and now publicly request you so to do, with an assurance that at the termination of this trial the truth or falsity of the informer's information shall be inquired into either by the grand jury or a committing magistrate.

"I have carefully investigated the subject myself and am perfectly confident that Mr. Goodnow honestly and truthfully declared on oath that he did not know Mr. Simmons, and I am equally confident that Mr. Simmons' declaration to you and to me was a truthful declaration, and that he did not know Mr. Goodnow, and that to his knowledge he had never held any conversation or communication with him.

"Of course, I cannot shut my eyes to the fact that if there is the slightest foundation for the informer's oath to you, that there
38 is or was any intimacy existing between Mr. Goodnow and Mr. Simmons, that such fact will necessarily operate to my client's prejudice. If, on the other hand, the informer has, as I believe, falsely made the statements referred to, it will not, in my opinion, have any effect upon the mind either of Mr. Goodnow or any member of the jury.

"It is not a little surprising to me that the informer, after a lapse of nearly seven years, is able to-day to state that he accidentally saw Mr. Goodnow and Mr. Simmons consulting with each other in any of the corridors of that public building at that time.

"I shall be ready to proceed with the trial of this case on Monday unless some more reasonable ground is urged than what I believe to be the false and malicious charge by a person confessedly entertaining ill-will towards Mr. Simmons.

"I am now engaged in inquiring into the character, surroundings, and antecedents of the informer, Charles Ward, and shall be

glad to submit the result of my investigation as soon as I am in receipt of the same.

"I am, my dear sir, regretting exceedingly this unfortunate occurrence, with assurances of respect,

"Yours very faithfully,

"RICHARD S. NEWCOMBE.

"The foregoing communication meets with the approval of my associates."

Goodnow & Simmons.

Of course, the affidavit of Broker Ward places Mr. Goodnow in a decidedly awkward position. He refuses to say anything about the case, however, beyond repeating his declaration that he does not know Mr. Simmons, and to the best of his recollection has never seen him before he saw him in the court. Mr. Goodnow's friends acknowledge that he did occupy offices at Nos. 165 and 167 Broadway in 1884, '5, but that they were certainly not aware nor did they believe that Mr. Goodnow was aware that such a man as Simmons existed.

Simmons denied to me that he ever met Mr. Goodnow. He said that Broker Ward's action was urged by a desire for revenge. In 1884, he said, Ward was agent for the building, and that he had had quite a squabble with the former about the amount of rent for rooms No. 16 and 17, which he occupied. This led to Ward securing a writ of ejectment and serving it upon Simmons. The latter says that in order to avoid further trouble about the matter he merely paid the rent and abandoned his offices. He was willing to make the most solemn assurances that he was not acquainted with the juror. In fact, he added, he was willing to declare that none of the persons who then frequented his offices knew Mr. Goodnow.

Mr. Ward further, then declaring that he was willing to abide by the statements made in his affidavit, declined to discuss the case.

The defense will investigate Mr. Ward.

The district attorney refused to make any statement, his chief anxiety being to defend Mr. Mott from Mr. Newcombe's insinuation that the former had told of the reasons for the adjournment, a thing of which Mr. Mott is absolutely innocent.

Counsel for the defense declare that they will sift the implied charge against their client to the uttermost. If they are able to prove that Mr. Ward's statements are unfounded they will insist upon a continuance of the trial by the present jury. Mr. Hess says that at the time Mr. Goodnow was chosen there was a very grave doubt in his mind as to his desirability as a juror. In fact, he had asked Simmons' advice about accepting him and the latter was opposed to doing it. Finally, however, when the jury was completed, he and Mr. Newcombe agreed that it was scarcely worth while to consume any more time. "So you see," said Mr. Hess, "Mr. Goodnow was by no means the favorite juror."

The following is Mr. Ward's affidavit, referred to in the affidavit of Mr. Mitchell:

United States Circuit Court, Southern District of New York.

THE UNITED STATES
vs.
JAMES A. SIMMONS.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles M. Ward, being duly sworn, on his oath deposes
41 and says that he resides at No. 784 Fifth avenue, in the city of New York, and his business is a commission broker; that from the year 1883 to 1886 deponent was the agent for and had charge of renting and collecting the rents for the owners of the building Nos. 165 and 167 Broadway, New York, then and now known as the "Parmly building;" that the deponent's mother was then and now is the owner of said building. Such building is a double office building with one main entrance from Broadway.

That in the year 1884 the above-named defendant, James A. Simmons, leased of deponent a suite of offices on the fourth floor of said Parmly building, and said Simmons occupied such suite from some time in 1884 for four or five months; that deponent yesterday was present in the United States circuit court, room 73, in the post-office building, when the trial of the case of United States against James A. Simmons was then taking place, and saw the said James A. Simmons, and deponent positively identifies said Simmons as the man who rented and occupied the suite of office rooms in the Parmly building, as above set forth, in the year 1884.

That deponent, when in the court-room yesterday, saw in the jury-box and as one of the jury sitting in the case of United States *vs.* James A. Simmons one William Goodnow; that deponent knows said Goodnow and has known him in and since 1884.

That during the year 1884 said Goodnow occupied offices in the aforesaid Parmly building, and deponent, during that year,
42 saw said William Goodnow and James A. Simmons together in the halls of said building many times engaged in conversation, and from about 1 January, 1884, to 1 May, 1884, Simmons and Goodnow occupied adjoining rooms on the fourth floor, Simmons occupying the two front rooms and Goodnow the back room.

CHARLES A. WARD.

Sworn to before me this 6th February, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. N. Y.

The following is Mr. Cherry's affidavit, referred to in the affidavit of Mr. Mitchell:

JANUARY 28TH, 1891.

WILLIAM GOODNOW sworn.

By Mr. JOYCE:

Q. Where do you transact business?
A. 280 Broadway.
Q. What is that business?
A. Real estate and loans.
Q. How long have you been in business?
A. About ten years.
Q. Do you remember reading last January in the newspapers an account of certain transactions and matters in which the Sixth National bank was involved?
A. In a general way.
Q. And the name of James A. Simmons as being mentioned in connection with those matters?
A. Yes.
Q. Did you, at the time of reading or thereafter, from that reading, form any opinion as to the guilt or innocence of James A. Simmons?
A. I did not. I have never thought of the matter since.
43 Q. You have had no conversation at all with any one with reference to those matters?
A. Not to my recollection.
Q. Have you read an account of the trial of Mr. Claassen?
A. I read in a general way what was in the papers at the time.
Q. Read whatever was published in the papers at the time?
A. Casually read it over.
Q. Did you form any opinion from reading those accounts in the papers as to the guilt or innocence of Mr. Simmons in connection with those transactions?
A. No; I don't think I did.
Q. You do not believe you did.
A. No.
Q. Are you so sure you did not that you can say you know you did not?
A. Yes; I can say I read them casually, and, having no interest, I did not charge my mind at all with them or take much interest in it.
Q. You have no opinion upon the matter as to the guilt or innocence of James A. Simmons?
A. No, sir.
Q. And if you take your place as a juror here you would give your verdict in strict accordance with the evidence without having that evidence first to remove any bias or prejudice against this defendant?
A. No, sir.

Mr. JOYCE: We withdraw the challenge.

By Mr. ROSE:

Q. How long have you been in business at 280 Broadway?
A. I changed my office from 165 Broadway about three or four months since.
Q. Where was your place of business before?
44 A. No. 165 Broadway for several years.
Q. The same business?
A. Yes.
Q. Are you in partnership or alone?
A. Alone.
Q. Any one occupying the same room with you?
A. Yes.
Q. Who is it?
A. I am with the St. John Packing Company.
Q. Were they occupying the same apartments with you at No. 165 Broadway?
A. No, sir; I had my own room then.
Q. Where do you live?
A. One hundred and twenty-first, No. 206.
Q. East or west?
A. West.
Q. How long have you lived there?
A. About two years.
Q. Have you heard the names of the various people called off here this morning?
A. Yes.
Q. Have you now any knowledge that you are acquainted with those persons?
A. Not to my knowledge.
Q. Don't you know the firm of Siegmund T. Meyer & Son that deal in and own a large amount of real estate uptown?
A. I do not know them personally.
Q. You know them by reputation?
A. Yes, sir.
Q. Do you know the members of that firm?
A. No, sir; none of them.
Q. Don't you know any of them at all?
A. No, sir.
Q. Are you acquainted with any of the counsel here?
A. Not to my knowledge; no, sir. I do not recognize any one.
45 Q. And you say you are not acquainted with James A. Simmons?
A. No, sir; never saw him to my knowledge.
Q. And have had nothing to do with him?
A. Don't even know where he is now. I presume he is here.
Q. You don't know what this case is about in any way, shape, or manner?
A. In a general way.
Q. Such as you have learned since you have been here to-day?

A. I learned it in a general way at the time I read of it in the newspaper.

Q. And you want us to understand that you could take your seat in the box as an unprejudiced and unbiased juror?

A. Yes.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William P. Cherry, being duly sworn, deposes and says that he is a stenographer; that on the 28th day of January, 1891, he was engaged in taking the stenographic minutes in the United States circuit court, before Judge Charles L. Benedict, in the case of United States *vs.* James A. Simmons; that he took the examination of one William Goodnow, who was then and there called as a juror in the above case, and that annexed hereto and made a part of this affidavit is a correct and true transcript of his said notes taken by deponent at said time on the examination of said Goodnow as to his qualifications as a juror.

WM. P. CHERRY.

Subscribed and sworn to before me this 6th day of February, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

46 Thereupon the counsel for the defendant read the following affidavits in opposition to the said motion of the United States attorney:

United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
JAMES A. SIMMONS.

STATE OF NEW YORK,
Southern District of New York.

James A. Simmons, being duly sworn, doth depose and say that an indictment was found against him under section 5209 of the Revised Statutes of the United States, and that his trial upon said indictment is now in progress in the circuit court of the United States in the southern district of New York; that one Charles M. Ward made affidavit on the 6th inst., upon an inquiry before the United States attorney for said district, as to the competency of a juror empanelled in the above-entitled cause, in which he swore that deponent was, between the months of January and May, 1884, acquainted with William E. Goodnow, a juror now empanelled in the case of the United States against Simmons; and said Ward in said affidavit further swore that he had seen this deponent in con-
47 versation with said Goodnow several times between the months of January and May, 1884, in some part of the building at No. 165 Broadway, in the city of New York; and this deponent

upon his oath saith that he never knew the said Mr. Goodnow either during the times aforesaid or at any other time, and that, to his knowledge, he had never seen the said Mr. Goodnow before the beginning of the trial of the aforesaid cause, and that he has never spoken to the said Mr. Goodnow either during the time alleged in the affidavit of said Ward or at any other time.

And this deponent further saith that he verily believes that the said Ward made his said affidavit falsely, maliciously, and with intent to prejudice this deponent in the trial of the indictment now pending against this deponent, and that said Ward did then and there wilfully and corruptly swear falsely and did commit wilful and corrupt perjury.

JAMES A. SIMMONS.

Sworn and subscribed to before me this seventh day of February, A. D. 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

Resworn to before me this 9th day of February, 1891.

JOHN A. SHIELDS,
U. S. Commissioner.

48 United States Circuit Court, Southern District of New York.

THE UNITED STATES
vs.
JAMES A. SIMMONS.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Richard S. Newcombe, being duly sworn, depose and say I am of counsel for the above-named James A. Simmons, who was on the 6th day of February, 1891, on trial in this court before Hon. C. L. Benedict and a jury, under an indictment charging him with aiding and abetting one Claassen in misappropriating and embezzling the funds of the Sixth National bank.

On the said 6th day of February the Hon. Edward Mitchell, the United States district attorney in and for said district, stated that sworn information had been given him by a person named Ward to the effect that said defendant held or had held intimate relations with one Goodnow, one of the jurors then sitting upon said trial, although said Goodnow had testified, upon being called upon as to his qualifications as a juror, that he was a perfect stranger to said Simmons and had never, to his knowledge, seen or spoken to him. This information was communicated to me by said district attorney, when I at once suggested that it was a subject deserving
49 investigation. This, according to my recollection, I stated in the presence of Judge Benedict and in his private chambers. The judge and district attorney both acquiesced in my suggestions, and, a few minutes after, the court was adjourned until the ninth instant by Judge Benedict, announcing substantially as fol-

lows: "Circumstances have come to my knowledge that make it proper for me to adjourn the case until Monday, at 11 a. m."

Immediately after that adjournment I suggested that the cause of the postponement should remain an absolute secret, and declined to and did not state or intimate to any one the reasons therefor, but within an hour thereafter I was visited by a Mr. Folsom, representing the New York Herald, who stated to me that Mr. Mott, an assistant to said district attorney, while refusing to give the reason for an adjournment, had stated substantially that the court had reason to believe from information received that the trustworthiness of one of the jurors was brought into question, and said Mr. Folson also stated he intended publishing that fact on the following day. At about this time I was also visited by a gentleman, whose name I forget, representing the Daily Continent, and who stated to me he had received information in a roundabout way from the district attorney's office, that the cause of the adjournment was due to some irregularity in the jury. I then felt that the reason for said adjournment was being disclosed, and that if published in the form
in which it had been communicated to the press it would
50 tend to prejudice the defendant's rights, and, so believing, I
wrote and sent to Mr. Mitchell my letter of the 6th day of February, 1891, and referred to in his affidavit herein.

Annexed hereto is an extract from the Morning Journal, a newspaper published in this city, which paper received no notice or any particulars of my letter above mentioned.

RICHARD S. NEWCOMBE.

Sworn to before me this 9th day of February, 1891.

JNO. B. TONER,

[NOTARIAL SEAL.] *Notary Public, N. Y. Co.*

Extract from the Morning Journal, Referred to in Mr. Newcombe's Affidavit.

Has the jury ——?

The Simmons trial takes a sensational turn.

Judge Benedict angry.

The case adjourned abruptly for reasons kept secret.

Has the jury been tampered with?

Strange stories are afloat concerning the trial of James A. Simmons in the United States circuit court before Judge Benedict. Simmons is charged with having aided and abetted General Peter J. Claassen in the wrecking of the Sixth National bank. Claassen
is in Ludlow-Street jail, a jury having said he had wrecked
51 the bank, and the next thing on the programme for him is
to receive his sentence.

That sentence may be not less than five nor more than ten years

in State's prison, or it may be that, having turned State's evidence, he will receive pardon.

It was said by a prominent lawyer yesterday that Claassen had been promised a pardon by the United States in the event of Simmons being convicted.

Claassen had been for two days on the witness stand, testifying against Simmons and doing all in his power to lay the blame for the disaster on Simmons' shoulders.

Interest in the case had reached a great height, and it was well known that Claassen was to be subjected to a most thorough and searching cross-examination by Richard S. Newcombe, Simmons' counsel, yesterday.

The hour set for the continuation of the case was 11 o'clock, and an eager throng was on hand promptly at that hour. Mr. Newcombe had said he would discredit the witnesses' testimony and make him contradict himself. He proposed to bring up Claassen's statement, on his own trial, that he had received the $50,000, part payment for the $622,000 worth of Sixth National bank bonds, from Simmons, and compare it with his story in the present case that the money was handed him by George H. Pell. A great time was expected, and every one about the court wore a subdued air of excitement. Then came the rumor that some one had tried to "see" the jury, and the excitement increased. In the meantime 11 o'clock
52 came, but with it no judge. That, however, surprised no one particularly, as the judge has been generally late through the trial. But United States District Attorney Mitchell was not on hand either, and every one knew that was odd, because he is usually the soul of punctuality. Mr. Newcombe was walking nervously up and down the corridor, and the jurors stood about smoking. Simmons leaned against a window biting his nails, and General Claassen sat inside the court-room talking with a friend and glancing every minute or two toward the door where the judge might be expected to enter. At last, at 12.45 o'clock, Judge Benedict was seen to leave his private room and to approach the court. As a rule he is pleasant and smiling, but on this occasion it was easy to see that he was in a bad humor. His complexion was a bright red, and his short mustache fairly bristled as he strode past the usher who was holding the door open. The clerk was ready to open the court, but the judge stopped him with a curt "Keep quiet." He was frowning savagely, and the moment he got upon the bench he brought his hand down on his desk with a bang. That was a signal for silence. Then he said, and those who were listening intently thought his voice trembled, "Facts have been brought to my knowledge which render it necessary that this case should be adjourned until Monday at 11 o'clock. You may go, gentlemen of the jury."

Then up sprang an usher, calling out that witnesses for the
53 United States should be on hand promptly on Monday morning, "And mine too," called out Mr. Newcombe, but no one paid any attention. It was evident that something strange had happened, and "What is it?" was the general inquiry. The reporters moved around the rail and approached Judge Benedict.

"May we ask why the case has been adjourned so suddenly?" inquired one of the newspaper men.

"Humph," the judge responded, "you may ask, but you will get no answer."

With that he left the court-room as abruptly as he had entered. Then a perfect buzz broke out among the spectators. District Attorney Mitchell was asked the cause of the adjournment, and answered that he would neither give a reason nor discuss the case.

"If you learned anything from the judge I want you to tell me," said Mr. Newcombe, "for I am entirely in the dark as to reason for the move."

After Judge Benedict had left the court-room all the counsel in the case went with Mr. Mitchell to his office and were closeted there for nearly an hour, and while they were inside a Journal man had a talk with Assistant United States District Attorney John O. Mott.

"The judge is very much excited over this matter," said Mr. Mott, "and remarkable developments will be made public Monday, but I can't say much now. You can see yourself that if some grave transaction had been discovered in which the jury were concerned it might be highly improper to discuss it now. You may count upon a startling sensation for Monday."

54 After a time the lawyers left Mr. Mitchell's room, and as they started towards the stairs Mr. Newcombe stopped for a moment by the Journal man's side.

"I can't tell you anything now," he said. "In fact, I would do almost anything to prevent your learning anything just now. We want to keep the thing quiet for the present at least."

Later the reporter had a talk with two of the jury—Tallmadge Delafield, of No. 95 Liberty street, and Valentine Daly, of No. 118 Wall street. Those gentlemen said they were entirely in the dark as to why the adjournment had been ordered so suddenly, and that no reason had been assigned to them.

Then the reporter called upon General Claassen, at Ludlow-Street jail, but his statement was to the effect that the move was an entire surprise to him, and that he was unable to account for it. Mr. Simmons had refused to talk about the affair in the court-room, referring all questions to his counsel, Mr. Newcombe.

And the counsel for the said defendant then and there objected to and opposed the motion of the attorney of the United States for a discharge of the jury, and the said judge did then and there give his decision as follows:

The COURT: I am of the opinion that the facts presented make it necessary to discharge the present jury from the further con-

55 sideration of this case in order to prevent the defeat of the ends of justice and to preserve the rights of the people and also to preserve the rights of the accused to be tried by a jury, every member of which can render a verdict free from constraint. It is manifest that the knowledge respecting the statement made by Ward, conveyed to the jury by the publication of the letter of the defendant's counsel, makes it impossible that in the future consideration

of this case by the jury there can be that true independence and freedom of action on the part of each juror which is necessary to a fair trial of the accused. Here I put an inquiry to the juror Goodnow whether he had read the publication in the newspapers?

Mr. GOODNOW: I read it, your honor. I would like——

The COURT: I put the same inquiry to the other gentlemen, whether any other gentlemen on the jury have read the publication in the papers?

Several jurors replied "Yes" and "I have."

The COURT: Therefore such a publication under the peculiar circumstances attending it affords, in my opinion, a sufficient ground to discharge the jury at this time. An order is therefore made that a juryman be withdrawn from the jury.

And then and there a juryman was withdrawn and the said jury was discharged from the further consideration of the issue aforesaid, whereupon the said counsel for the said defendant did then and there, on behalf of the said defendant, except to the order of the said judge discharging the jury as aforesaid.

56 And the counsel for the defendant thereupon moved for the acquittal of the defendant because of the discharge of the said jury as aforesaid; but his honor, the said judge, denied said motion, whereupon the counsel for the defendant excepted to the denial of said motion.

Thereupon, afterwards, to wit, at a circuit court held in the city of New York in and for the southern district of New York, on the twelfth day of February, in the year A. D. 1891, before the Hon. Charles L. Benedict, one of the judges appointed to hold the said circuit court according to the form of the statute in such case made and provided, the aforesaid issue so joined between the said parties as aforesaid came on to be tried by another jury of the district aforesaid for that purpose duly empanelled, and was continued thereafter from day to day, at which time came there as well the said United States as the said defendant, by their respective attorneys aforesaid, and thereupon counsel for the defendant moved the said court for permission to file a plea in bar on the ground of former jeopardy, because of the discharge before verdict, as aforesaid, of the first jury empanelled and sworn to try said issue, a copy of which plea here follows:

57 United States Circuit Court, Southern District of New York.

THE UNITED STATES OF AMERICA }
vs.
JAMES A. SIMMONS. }

And the said James A. Simmons, being brought to the bar of the court and having heard the said indictment read and the matters therein contained, says that he ought not to be put to answer the said indictment, he having been heretofore in due manner of law placed once in jeopardy of being deprived of his liberty and imprisoned for

the term of five or ten years of and by the premises in and by the said indictment above specified and charged upon him.

And for a further plea to the said indictment he says that heretofore, to wit:

That this defendant was on the seventh day of October, A. D. 1890, indicted by the grand jury of the United States of America for the southern district of New York, in the second circuit, charging said defendant as follows:

First Count.

That one Peter J. Claassen, within the jurisdiction of this court, being then and there the president of a certain national banking association known and designated as the Sixth National Bank of the City of New York, which said association had been there-
58 tofore created and organized under and by virtue of a certain act of Congress in said indictment named and specified, did, on the twenty-second day of January, A. D. 1890, by virtue of his said office and employment and while so employed and acting as such president as aforesaid, received and take into his possession certain funds and credits, to wit, a large number of bonds and written obligations of certain railroad companies in said indictment named and aggregating the par value of six hundred and twenty-two thousand dollars ($622,000) and convert them to his own use, and that this defendant, James A. Simmons, was then and there present, unlawfully and wilfully and with like intent aiding and abetting, counseling, and procuring the said Peter J. Claassen to commit the offence aforesaid in manner and form aforesaid, he, the said James A. Simmons, then and there well knowing the said Peter J. Claassen to be then and there the president of said association as aforesaid, with intent then and there on the part of him, the said James A. Simmons, to injure and defraud the said association, contrary to the form of the statutes of the United States in such case made and provided.

Second Count.

That the said Peter J. Claassen, president, &c., of said bank, did, on the same day, to wit, the twenty-second day of January, A. D. 1890, wilfully and unlawfully and with intent to injure and defraud the said association, misapply and convert to the use, benefit, and advantage of the said James A. Simmons certain moneys
59 and funds then and there being the property of said association, to wit, the sum of sixty thousand dollars ($60,000) in the manner and by the means as in said indictment fully and at length set out upon reference being had thereto.

And further presented that James A. Simmons, this defendant, was, at the place at all times thereinbefore mentioned, present, unlawfully and wilfully and with like intent aiding, abetting, counseling, and procuring the said Peter J. Claassen to commit the said offence in manner and form as therein set out, with the intent to injure and defraud the said association, contrary to the form of the statute of the said United States made and provided.

Third Count.

That the said Peter J. Claassen, president, &c., of said bank, did, on the same day, to wit, the twenty-second day of January, A. D. 1890, wilfully and unlawfully and with intent to injure and defraud the said association, misapply and convert to the use, benefit, and advantage of a certain copartnership composed of William M. Kilduff and Charles E. Wallack, carrying on business under the name and style of Pell, Wallack & Co., certain moneys and funds then and there being the property of said association, to wit, the sum of sixty thousand dollars ($60,000), in the manner and by the means as in said indictment fully and at length set out upon reference being had thereto.

And further presented that James A. Simmons, this defendant, was, at the place at all times thereinbefore mentioned, present, unlawfully and wilfully and with like intent aiding, abetting,
60 counseling, and procuring the said Peter J. Claassen to commit the said offence in manner and form as therein set out, with the intent to injure and defraud the said association, contrary to the form of the statute of the United States made and provided.

Fourth Count.

That the said Peter J. Claassen, president, &c., of said bank, did, on the same day, to wit, the twenty-second day of January, A. D. 1890, wilfully and unlawfully and with intent to injure and defraud the said association, misapply and convert to the use, benefit, and advantage of a certain copartnership composed of John Satterlee and James A. Simmons, carrying on business under the name and style of John Satterlee & Co., certain moneys and funds then and there being the property of said association, to wit, the sum of sixty thousand dollars ($60,000), in the manner and by the means as in the said indictment fully and at length set out upon reference being had thereto.

And further presented that James A. Simmons, this defendant, was, at the place at all times thereinbefore mentioned, present, unlawfully and wilfully and with like intent aiding, abetting, counseling, and procuring the said Peter J. Claassen to commit the said offence in manner and form as therein set out, with the intent to injure and defraud the said association, contrary to the form of the statute of the said United States made and provided.

Fifth Count.

That the said Peter J. Claassen, president, &c., of said bank,
61 did, on the twenty-second day of January, A. D. 1890, wilfully and unlawfully and with intent to injure and defraud the said association, misapply and convert to the use, benefit, and advantage of the Lenox Hill bank, a banking corporation organized under and by virtue of the laws of the State of New York, certain moneys and funds then and there being the property of said association, to wit, the sum of two hundred and seven thousand eight hundred

dollars ($207,800), in the manner and by the means as in said indictment fully and at length set out upon reference being had thereto.

And further presented that James A. Simmons, this defendant, was, at the place at all times thereinbefore mentioned, present, unlawfully and wilfully and with like intent aiding, abetting, counseling, and procuring the said Peter J. Claassen to commit the said offense in manner and form as therein set out, with the intent to injure and defraud the said association, contrary to the form of the statute of the said United States made and provided.

That this defendant was, on the thirteenth day of October, A. D. 1890, arraigned before this honorable court on the said indictment and pleaded "not guilty."

That thereafter, on the twenty-six day of January, A. D. 1891, said indictment was called for trial; a jury was called and accepted on behalf of the people and on behalf of this defendant.

The jurors so called and accepted were duly sworn and the trial of said indictment was thereupon proceeded with, and said
62 defendant was then and there duly and regularly put in charge of the said jury.

That testimony was thereafter taken on the twenty-ninth day of January, A. D. 1891, and on the second, third, fourth, and fifth days of February, A. D. 1891.

That the Honorable Charles L. Benedict presided as judge upon said trial.

That on the third day of February, A. D. 1891, the court in which said indictment was being tried was adjourned until the fourth day of February, A. D. 1891, at one and a half p. m.—

For the purpose, as this defendant was informed and believes, of allowing said Honorable Charles L. Benedict to hold court in the city of Brooklyn, and said judge did, as defendant is informed and believes, then and on a subsequent day hold that court in the said city of Brooklyn and heard, as judge, divers motions.

That thereafter, on the fifth day of February, A. D. 1891, a recess of this honorable court was taken until the sixth day of February, A. D. 1891, at eleven o'clock a. m.

That on the sixth day of February, A. D. 1891, this honorable court did not convene at eleven o'clock a. m., nor were any proceedings had therein in this cause until about forty minutes after twelve o'clock on that day, when the said Honorable Charles L. Benedict (the court being duly opened and in regular session) ascended the bench and stated as follows:

"Circumstances have come to my knowledge which in
63 my judgment render it necessary to adjourn the trial of this cause until Monday morning at eleven o'clock."

And said court was thereupon adjourned without further action until the ninth day of February, A. D. 1891, at eleven o'clock a. m., without any charge or direction by the court to the jury.

That on said adjourned day and hour said defendant and his counsel were present in said court ready to proceed with the trial of said indictment, when the following proceedings were had:

Tenth Day.

UNITED STATES
v.
SIMMONS.

NEW YORK, *February 9th*, 1891.

The COURT: Is there any objection on the part of the defense to proceeding with this trial before this jury?

Mr. NEWCOMBE: None at all, sir.

The COURT: Is there any objection on the part of the Government?

Mr. MITCHELL: There is, your honor.

Mr. NEWCOMBE: Before any statement is made, your honor, I want to be recorded as objecting to any statement being made by the counsel for the Government in the presence of this jury which might tend to have any reference to the cause of the adjournment on Friday last. I would like the objection to be noted, your honor.

The COURT: You desire to have the jury directed to withdraw while any motion is made, I suppose?

64 Mr. NEWCOMBE: I don't care whether they withdraw or not. I simply object at this stage to any comment being made or that the trial of the indictment be interrupted for the purpose of receiving any statement from the district attorney.

The COURT: That is a different ground from what you put it on before. I will excuse the jury until recess, if you desire it.

Mr. NEWCOMBE: I will place it upon both grounds, your honor. I object to the trial of the indictment being interrupted for the purpose of such statement as was indicated by the court's question.

Mr. MITCHELL: I am perfectly willing, if the counsel for the defendant desires, to have the jury excused until recess, and he so moves.

Mr. NEWCOMBE: I do not consent, your honor. I feel that the entire proceeding is one either for the purpose or which must have the effect of tending to affect this jury, and I object to a proceeding of this character, believing that it is for the purpose of imperiling the interest of my client.

Mr. MITCHELL: I submit, your honor, that this statement coming from the source from which it does at this time, and in view of the fact that the defendant by this very counsel has, through the public prints, gone to this jury already—I submit that the objection is not made in good faith. I submit that his suggestion to the court is an aspersion upon the counsel for the Government that is as

65 gross and uncalled for as it is untrue in fact. The lips of the counsel for the Government have been sealed pending this trial in court, and it is only because the defendant, through his counsel, has seen fit to go to that jury through the public prints that it is incumbent upon me to make the motion which I propose to make to the court this morning. Now, with reference to whether the jury should remain or retire during the consideration by your

honor of that motion, I am perfectly willing to consent to such course as may be desired by the counsel for the defendant and directed by the court. The matter is one which is addressed to the court alone, and is not a subject in any case or in any stage for the consideration of the jury.

The COURT: If you suggest it, I will direct the jurors to withdraw for an hour.

Mr. NEWCOMBE: We except, sir.

The COURT: You cannot take an exception when I say if you suggest it.

Mr. NEWCOMBE: I do not suggest it.

The COURT: Nor desire it?

Mr. NEWCOMBE: Nor desire it.

The COURT: Very well; put that on the record.

Mr. NEWCOMBE: I want only a word or two in answer to the statement that counsel for the defendant communicated to the public press on Friday.

Mr. MITCHELL: I think that is hardly in order now.

The COURT: You better be in order probably.

66 Mr. NEWCOMBE: May I not be permitted to answer the imputation?

The COURT: I don't think you have a right to reply now; you have a right to reply in the future.

Mr. NEWCOMBE: I submit now is my time to reply, because it is upon that question that the district attorney addressed the court.

Mr. MITCHELL: It was simply with reference to the question whether the jury should remain here or not that I addressed the court.

Mr. NEWCOMBE: I submit now is the proper time. If your honor thinks it is not I will resume my seat and wait until my turn comes. It will come.

The COURT: You better wait until your turn comes.

Mr. NEWCOMBE: It will come.

Mr. MITCHELL: If the court please, I move on the minutes and on the affidavits submitted to withdraw a juror for the reason that, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated. The affidavits that I have I will now read.

The COURT: I think it is perhaps wiser to let the jury retire, and if there is no objection on either side I will direct the jury to retire while this motion is being made.

Mr. NEWCOMBE: I object to the direction and except.

The COURT: If you object I will let them stay.

(Mr. Mitchell reads the affidavit of Edward Mitchell,
67 Charles M. Ward, and William P. Cherry.)

Mr. MITCHELL: I submit, your honor, that under all the circumstances disclosed on the minutes of the court and on these papers which I now submit that it is a manifest necessity that this case should be withdrawn from the present jury. I need not add that it is with great regret that I feel obliged to make this motion.

Much time has been expended by the court and by the jury already in the consideration of the merits of this case, and I feel that it is an obstruction to justice in which the Government at least has had no share.

Mr. GOODNOW: Your honor——

Mr. NEWCOMBE: Will you excuse me one minute. Before answering the motion made by the district attorney, by reason of his motion, I now move that your honor direct the acquittal of the defendant, James A. Simmons.

The COURT: I will give you an exception.

Mr. NEWCOMBE: We except. I will now read a short affidavit made by Mr. Simmons, made for another purpose, but which was resworn to this morning.

(Mr. Newcombe reads the affidavit of James A. Simmons.)

The COURT: I will hear the counsel.

Mr. NEWCOMBE: Now, if the court please, in answer to the suggestion on the part of the district attorney, it was stated in his closing remarks that there had been an obstruction of justice to which the learned district attorney was not a party. It may
68 perhaps be well to consider the origin of that which is termed "obstruction of justice." We charge in the affidavit of Mr. Simmons, and we will substantiate it at some time or other, that the district attorney received a communication from an irresponsible person of questionable repute, and upon its receipt, without investigation, it was submitted, and the unfortunate adjournment of Friday took place. Now, if the obstruction of justice took place it was then, and if it took place it was because of an omission upon his part to properly investigate the malicious charge made by a man confessedly entertaining ill will towards Mr. Simmons before obstructing the course of justice in the trial of this indictment. Now, if your honor please, in reference to the communication made by one of the counsel for the defendant to the press on Friday afternoon, it is stated in that letter, and we propose to substantiate it by affidavit, that before a line of that letter was written the district attorney's office for this district had communicated to at least three members of the press that the reason for the adjournment was because of some irregularity with reference to one of the members of the jury, and it was declared to me that information thus conveyed to him would be published in the press on the following day.

The COURT: Do you read any other affidavits?

Mr. NEWCOMBE: I have an affidavit of my own now being prepared. I have not had an opportunity of preparing it until now, because I did not know what I was going to be called upon
69 to answer. It will be presented to your honor in a few moments; that at least three members of the press gave me that information after I had refrained from disclosing the slightest basis for the postponement, and then and not until then did I feel that I should be negligent of my duty; that I should not perform my duty to my client unless I allowed the entire facts to be laid before the public. Suppose, if your honor please, if instead of having

pursued the course I did I had permitted the information that those gentlemen say they received from the district attorney's office to be published in the press on Saturday morning, what would of necessity be the position of the members of this jury? If without any intimation being conveyed as to who was referred to there, was an intimation conveyed to the press from the district attorney's office that there was an irregularity in the jury? And, as your honor will observe, from at least one of the newspapers, without having any reference to this letter, it commences in large letters, "Have the jury been," and then there is an interrogation mark and an entire column devoted solely to the information which the reporter intimates was conveyed to him by the office. Now, there was my justification. I wrote that letter deliberately. I felt that it was my duty to write that letter, and if the same circumstances arose to-day I should repeat that act, believing it was my duty, and that I should omit to perform my duty if I did not pursue that course; that is the answer we make, sir.

The COURT: Will you file your affidavit? Is it prepared?

70 Mr. NEWCOMBE: It is being prepared now, your honor. It will be ready in a few minutes. The affidavit of Mr. Simmons is ready, and that I file.

The COURT: There is no objection to filing the other I suppose—no other remarks by counsel.

I am of the opinion that the facts presented make it necessary to discharge the present jury from further consideration of this case in order to prevent the defeat of the ends of justice and to preserve the rights of the people, and also to preserve the right of the accused to be tried by a jury every member of which can render a verdict free from constraint. It is manifest that the knowledge respecting the statement made by Ward, conveyed to the jury by the publication of the letter of the defendant's counsel, makes it impossible that in the future consideration of this case by the jury there can be that true independence and freedom of action on the part of each juror which is necessary to a fair trial of the accused. Here I put an inquiry to the juror Goodnow, whether he had read the publication in the newspapers.

Mr. GOODNOW: I read it, your honor. I would like——

The COURT: I put the same inquiry to the other gentlemen, whether any other gentlemen on the jury have read the publication in the papers.

Several jurors replied, "Yes" and "I have."

The COURT: Therefore such a publication, under the pecu-

71 liar circumstances attending it, affords, in my opinion, a sufficient ground to discharge the jury at this time. An order is therefore made that a juryman be withdrawn from the jury. The first juryman will stand aside.

Mr. NEWCOMBE: To which the defendant objects and takes an exception, and, following the exception, we now move for a discharge of James A. Simmons.

The COURT: Do you want to make that before I discharge the rest of the jury?

Mr. NEWCOMBE: I am not particular; I will wait.

The COURT (to Mr. Goodnow): You will have to postpone your statement until a more proper occasion.

Mr. NEWCOMBE: I ask that the juror be permitted at this stage to make the statement. It is due to the juror.

Mr. GOODNOW: I think it is due to me.

The COURT: I think the proper place for you to make it is elsewhere than here.

Mr. GOODNOW: I would state now, your honor, that as a citizen I demand the most thorough investigation; I court it. My answer was on my oath, and I now reiterate it. I never saw Mr. Simmons nor spoke with him in my life until he was pointed out to me in this room. I never occupied a room on the fourth floor of Mr. Ward's mother's building. I did on the fifth floor for over four years, room 21, and there is Mr. Ward's receipt for it. I went in that room an the first of May, 1884, and not previous to that time.

The COURT: That is sufficient.

Mr. MITCHELL: The juror is not on trial.

72 The COURT: No; the proper place to make your statement is not here. Under the circumstances, gentlemen, you are discharged from the further consideration of this case, and you are likewise discharged from further attendance at this term.

The jurors here left their seats.

The COURT: Now, will you renew your motion?

Mr. NEWCOMBE: We again object to the order and to your discharging the jury as they are now discharged, and we move for the acquittal of the defendant.

The COURT: The motion is denied.

Mr. NEWCOMBE: We except.

The COURT: It is ordered that the trial of this case proceed on Thursday of this week, and that a panel of 150 jurymen be summoned for that day.

Adjourned.

That by the acceptance and swearing of said jury and the taking of testimony and the placing of this defendant in charge of said issue so framed as aforesaid this said defendant was placed in jeopardy of being deprived of his liberty and imprisoned for the term of five or ten years for the supposed offenses set forth in said indictment, and that by the action of the court on the said ninth day of February, A. D. 1891, ordering that a juryman be withdrawn from the jury and discharging the jury from the further consideration of this case against the objection of this defendant that

73 this defendant was thereby acquitted of the several counts contained in the said indictment.

That by the finding of said indictment, the arraignment of this defendant therein, his plea of not guilty and joinder of issue, and by swearing of said jury to try said issue, the placing of said defendant in charge of the said jury, taking testimony, and placing with the trial of said issue and subjecting this defendant to the hazard

and peril of the verdict therein this defendant was placed in jeopardy, and under the Constitution of the United States this defendant cannot be again placed in jeopardy by reason of the matters in said indictment contained.

Wherefore he, the said James A. Simmons, prays the judgment of the court here if he ought to be put to further answer this present indictment, and whether the said United States ought further to prosecute or impeach him, the said James A. Simmons, on account of the premises in the present indictment contained, and that he may be dismissed the court and go without day.

JAMES A. SIMMONS, *Defendant.*

RICH'D S. NEWCOMBE,
EDW'D H. MURPHY,
CHAS. A. HESS,
JOHN J. JOYCE,
Of Counsel.

STATE OF NEW YORK, }
Southern District of New York, } *ss:*

James A. Simmons, being duly sworn, deposes and says he
74 is the defendant in the above-entitled action; that he has read the foregoing plea and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JAMES A. SIMMONS.

Sworn to before me this 17th day of February, 1891.

JOHN A. SHIELDS,
U. S. Com'r, S. D. N. Y.

The district attorney objected to the motion for leave to file the so-called plea in bar on the following grounds:

That it is an additional plea, not allowable in cases of misdemeanor; that it is bad for duplicity; that it does not truly set forth the proceedings heretofore had in this cause according to the records of the court, and that even if it did the matters therein set forth would not now be the proper and fit subject of a plea of this kind.

And thereupon the said counsel for the said defendant did then and there insist before the said judge on behalf of the said defendant that said plea in bar ought to be admitted and allowed to be filed, but the said judge denied the said motion and refused to permit the filing of said plea; whereupon the counsel for the defendant noted an exception to the denial of said motion.

A jury having been empanelled and sworn and the case for the United States having been opened to the jury—

75 The attorney of the United States, to maintain and prove the said issue, having proved the organization and incorporation of the Sixth National bank, as alleged in the indictment, called CHARLES H. LELAND, who, being duly sworn, testified "that he resided

in January, 1890, at No. 162 Madison avenue, N. Y.;" that from the 3rd of December, 1883, to the morning of "the 22nd of January, 1890, he had been president of the Sixth National bank and had been a stockholder in such bank for ten or fifteen years prior to 1890; that on the 22nd day of January, 1890, Andrew E. Colson was the cashier and George W. Pancoast was the assistant cashier; that the directors of the bank were William J. Quinlan, Charles Frothingham, John G. Doubleday, Charles F. Leland, and myself, and that he, the witness, owned himself 1,005½ shares of stock and controlled thirty shares in addition.

"That the number of shares of the capital stock was 2,000; that on the 17th of January, 1890, he first saw the paper shown him, the body of it being in the handwriting of the witness and the signature in the handwriting of George H. Pell, made in the presence of the witness by Mr. Pell and handed to the witness.

"The paper was received in evidence and is as follows:

"NEW YORK, *January 17th*, 1890.

"I have this day bought for account James A. Simmons from Charles H. Leland 1,035½ shares of the stock of the
76 Sixth National Bank of New York, deliverable and payable at $650 per share on deposit January 22nd, 1890.

"JAMES A. SIMMONS,
"Per GEORGE H. PELL.

"That he next saw Mr. Pell on the 22nd day of January at the bank. The cashier, Mr. Colson, was present, and while Mr. Pell was there Mr. Simmons, Mr. Claassen, Mr. Watson, and Mr. Ripley came in the bank. Mr. Pell produced a number of checks, which he tendered in payment of stock which he had bought for Mr. Simmons. I took the checks and examined them and made a list of them and delivered Mr. Pell the stock which was purchased in return for them. Those are the checks which I received:

"J. A. Simmons on the Lenox Hill bank, $25,000; I. B. Newcombe & Company, Bank of the State of New York, order of E. L. Roberts, $40,000; P. J. Claassen on the Park bank, order of himself, and endorsed, $30,000; George H. Pell on St. Nicholas bank, order of himself, and endorsed, $28,000; Meyer Lighter, account of P. L. Meyer, and endorsed, $20,000; the same for $50,000, and from the First National bank the check which Mr. Watson gave me on the Sixth National bank for $30,000; Pell, Wallack & Co. on the Third National bank, order of themselves, and endorsed, $150,000; James A. Simmons on Third National bank, order of himself, and endorsed, $150,000; James A. Simmons on the Commercial bank, order of himself, and endorsed, $100,000; Hoadley & Company on the Western National bank, order of W. M. Kilduff, $20,000, and the same on the City bank for $30,000, making in all $673,000.

77 "The checks were all paid. The witness then identified a number of checks, and they were admitted in evidence as follows:

"January 22, 1890. Lenox Hill bank pay to the order of C. H.

Leland twenty-five thousand dollars. James A. Simmons. For deposit, Charles H. Leland.

"January 22, 1890. The Third National Bank of New York pay to the order of ourselves one hundred and fifty thousand dollars. Pell, Wallack & Co., agents. Certified and endorsed Pell, Wallack & Co., agents. For deposit, Charles H. Leland.

"New York, January 22, 1890. The Sixth National bank pay to the order of C. H. Leland thirty thousand dollars. J. Kenneth Watson. Certified by the Sixth National bank. Endorsed for deposit, Charles H. Leland.

"New York, January 22, 1890. Pay to the order of W. M. Kilduff twenty thousand dollars. Hoadley & Co. Endorsed W. M. Kilduff. For deposit, Charles H. Leland.

"New York, January 22, 1890. The National City bank pay to the order of W. M. Kilduff thirty thousand dollars. Hoadley & Co. Endorsed W. M. Kilduff. For deposit, Charles H. Leland.

"New York, January 22, 1890. Bank of the State of New York pay to the order of E. L. Roberts forty thousand dollars. I. B. Newcombe & Co. Countersigned J. M. Bowers, cashier. Endorsed Edward L. Robertson. For deposit, Charles H. Leland.

78 "New York, January 22, 1890. The National Park Bank of New York pay to the order of myself thirty thousand dollars. P. J. Claassen. Endorsed P. J. Claassen. For deposit, Charles H. Leland.

"New York, January 22, 1890. St. Nicholas Bank of New York pay to myself or order twenty-eight thousand dollars. George H. Pell, agent. Endorsed George H. Pell, agent. For deposit, Charles H. Leland.

"The witness then, being further examined, identified certain certificates of stock shown to him. He testified that they were the certificates of stock of the Sixth National bank delivered by him on receiving the checks aggregating $675,000, and the stock powers appended were all signed at the time that these certificates were delivered.

"The certificates were offered in evidence and marked Exhibits 15 to 22, inclusive, and were eight certificates of stock in the Sixth National bank, one for ten shares to Charles Frothingham, one for ten shares to John G. Doubleday, one for ten shares to Charles F. Leland, and the other five are in the name of Charles H. Leland and are, one for thirty shares, another for ten shares, one for one hundred and forty shares, one for four hundred shares, and one for four hundred and twenty-five and a half shares, making in all one thousand thirty-five and a half shares, and this was all the stock owned by the said Charles Frothingham, John G. Doubleday, Charles F. Leland, and Charles H. Leland."

The witness, continuing his testimony, was shown certain
79 other certificates of stock of the Sixth National bank, and stated that the signature of "C. H. Leland, president," on each of the said certificates was in his handwriting and that the signature of A. E. Colson, as cashier, was in the handwriting of Mr.

Colson. The certificates were offered in evidence and marked Exhibits 23 to 28, both inclusive.

Q. The certificates of stock which have just been offered in evidence are all dated the 22nd of January, 1890, and there are five of them, for ten shares each—one to P. J. Claassen, another to J. Kenneth Watson, the third to D. M. Ripley, the fourth to H. P. Cutter, and the fifth to James Jourdan—and one other certificate for 985½ shares to James A. Simmons; these were all signed by you as president?

A. Yes, sir.

Q. Was there a meeting of the board of directors of the Sixth National bank on the 22nd of January, 1890?

A. There was.

Q. At which you presided?

A. I did.

Q. Who were present of your directors?

A. Mr. Charles Frothingham, Mr. John G. Doubleday, and myself.

Q. Who acted as secretary or clerk of the meeting?

A. The cashier, A. E. Colson.

Q. What took place at that meeting?

A. The resignation of Mr. Quinlan was first presented, read, and acted upon, and Mr. Claassen was elected in his place.

Q. Mr. Claassen was elected in his place?

A. That is my recollection; yes, sir.

Q. What then took place? Did Mr. Claasses come in?

A. Mr. Claassen came in.

80 Q. On being notified that he was elected?

A. On being notified that he was elected. Then the resignation of my son, Mr. Charles F. Leland, was presented.

Mr. NEWCOMBE: There were minutes of this meeting kept, I understand.

The minutes were identified by the witness, and the same offered and received in evidence and are as follows:

"NEW YORK, *January* 22, 1890.

A meeting of the board of directors.

Present: C. H. Leland, C. Frothingham, J. G. Doubleday. Mr. W. J. Quinlan, Jr., offered his resignation as director. On motion of C. Frothingham, it was accepted.

On motion of J. G. Doubleday, Mr. P. J. Claassen was nominated and elected as director. Mr. C. F. Leland offered his resignation as director. On motion of C. H. Leland, it was accepted. On motion of P. J. Claassen, Mr. D. M. Ripley was nominated and elected a director. C. Frothingham offered his resignation as a director. On motion of C. H. Leland, it was accepted. P. J. Claassen nominated J. Kenneth Watson as a director. On motion, was elected. Mr. J. G. Doubleday offered his resignation as a director. On motion, was accepted. Mr. P. J. Claassen nominated Mr. H. T. Cutter as a director. On motion of C. H. Leland, was elected a

director. C. H. Leland offered his resignation as a director. On motion, was accepted. On motion of P. J. Claassed, Mr. James Jourdan was nominated and elected a director."

81 "NEW YORK, *January* 22, 1890.

"A meeting of the board of directors.

"Present: P. J. Claassen, D. M. Ripley, H. T. Cutter, J. Kenneth Watson.

"On motion of D. M. Ripley, P. J. Claassen was nominated and elected president."

The testimony further showed that there were present at the bank on the 22nd of January, 1890, Messrs. Charles H. Leland, Charles Frothingham, and John G. Doubleday, three of the five directors of the Sixth National bank at the time when the defendant and the others mentioned by Mr. Leland arrived at the bank on that day. After their arrival the checks were received by Leland for the stock contracted to be sold to Simmons; then the certificates for 1,035½ shares were assigned by the owners thereof. These certificates were then surrendered and the new certificates, Exhibits 23 to 28, were thereupon issued in place thereof. After the issue of the new certificates the Leland board of directors held the meeting, the minutes of which appear herein, and thereafter Messrs. Claassen, Ripley, and Watson held a meeting as directors of the Sixth National bank, at which Mr. Claassen was elected president. These transactions occupied the space of about one hour. Neither Peter J. Claassen, David M. Ripley, nor J. Kenneth Watson on that day or down to the 29th of January, 1890, ever took any oath of office as directors.

The evidence shows that from the time of the meeting of the so-called board of directors on January 22, 1890, Claassen assumed to act and did act continuously as president of the bank
82 to and including the 29th of January, 1890, which was known to the defendant.

Defendant's counsel objected to the admission of evidence of any of the acts of Claassen under a claim that he was acting as president of the Sixth National bank, upon the grounds that the meeting at which he was elected a director was an illegal meeting by persons acting as directors who were not qualified to act, as they were not then stockholders in the bank either in fact or in name; that Claassen was never qualified to act as a director or president.

The court overruled the objection; to which defendant's counsel duly objected.

The evidence further showed that among the acts so done by Claassen, as president, were the following: He directed the making of the three $60,000 cashier's checks mentioned in the indictment; he caused to be sent to each of the banks in the city of New York that were members of the clearing-house association a notice of his election as president with his signature affixed; he caused notice to be sent to all of such banks that the Sixth National bank would thereafter act as the clearing agent of the Lenox Hill bank; he received from Mr. Leland at the safe-deposit vaults of the Park Na-

tional bank all the bonds and securities belonging to the Sixth National bank and receipted for the same as president. The jury found that on the 23rd and 24th days of January he delivered to George H. Pell, with the knowledge of the defendant, the 622 bonds set forth in the first count of the indictment.

83 The attorney of the United States, further to maintain and prove the said issue, called ANDREW E. COLSON, who, being sworn, testified that on the 22nd day of January, 1890, he was the cashier of the Sixth National bank, and that the first time he saw the receipt for the bonds was between twelve and three o'clock on the afternoon of the 24th of January, 1890, on the desk of Mr. Pancoast, the assistant cashier of the Sixth National Bank of New York, the following-named bonds to be sold for account of said bank and accounted for to its president, as he may demand. List: St. Louis and San Francisco first-mortgage bonds, $10,000. Then follow the various securities as specified in the first count of the indictment and footing up $622,000. Signed "Pell, Wallack & Co."

The COURT: That is the receipt for the bonds that were given to Mr. Pell down here?

Mr. MITCHELL: Yes, your honor.

By the COURT:

Q. On the 24th you say you saw that?

A. That is my best recollection; that it was on the 24th, after 12 o'clock, or in that neighborhood.

By Mr. NEWCOMBE:

Q. Is that to the best of your recollection?

A. That is the best that I can say.

By Mr. MITCHELL:

Q. Had you any information that these bonds had been delivered to Pell, Wallack & Co. before you saw this receipt?

A. No, sir.

Q. Had you any conversation with any one in reference to delivering these bonds to Pell, Wallack & Co., specified in this list?

A. No, sir.

84 Q. What, if any, sum of money did the bank receive before the 29th of January on account of those bonds, if you know?

Mr. NEWCOMBE: I object if the question is limited to the 29th of January. I can see no reason why we are arbitrarily limited to the 29th of January. I object to the question in that form.

Witness testified that on the 28th day of January, 1890, the bank received $50,000 in money on account of the $622,000 of bonds.

The counsel for the said defendant then cross-examined the witness, who on such cross-examination testified as follows:

Q. Did you receive anything in addition to the money spoken of by you on your direct examination on account of the 622 bonds?

Objected to unless the time is limited to the close of business on the 29th of January. Objection sustained. Exception by defendant.

The attorney of the United States, further to maintain and prove the said issue, called ALONZO B. HEPBURN, who, being duly sworn, testified that he was a national bank examiner on the 22nd of January, 1890, and is so still, and that on the 29th of January, 1890, he made an examination in his official capacity of the Sixth National bank, of its books, its assets, and of all its affairs; that he went with Andrew E. Colson, the cashier of the Sixth National bank,
85 to the National Park bank safe-deposit vaults to examine the securities belonging to the Sixth National bank which were alleged to be there, and that on the way to said vaults the said cashier handed to witness a receipt signed by Pell, Wallack & Company for a large number of bonds; that the securities called for by the books of the Sixth National bank were all found except those named in said receipt, and that, not finding those last, witness sent for General Claassen, the president of the Sixth National bank, and the examination was there continued as follows:

Q. Is this the paper (referring to Exhibit 47), the paper which you refer to as the receipt of Pell, Wallack & Co.?

A. Yes, sir.

Q. What was done after General Claassen reached the bank?

A. We then went out in search of the bonds. He said that a part had been sold.

Q. You say that "we went out." Who do you mean?

A. General Claassen and myself.

Q. Where did you go?

A. We went to the office of Mr. Pell—to some number, I do not recollect what—in Liberty street.

Q. And when there what was done by you?

A. I made a demand upon Mr. Pell for the bonds represented by the receipt to which you have referred. I had the receipt with me, and I made a demand upon him for the bonds and securities covered by that receipt.

Q. What did you say to him?

Objected to and question waived.

By the COURT:

Q. Did you get them?

86 WITNESS:

A. No, sir; not at that time. I did later get some.

Q. Did you get them at the office of Pell, Wallack & Co.?

A. I got some coupons there that belonged to those bonds—the July coupons, which had been cut off and separated from the bonds. They were in this office, and were given to me by Mr. Pell at that time.

Q. In the presence of Claassen?

A. Yes, sir.

Q. And that is all that you got at the office of Pell, Wallack & Co.?

A. That is all I got there.

Q. Did you get any of the bonds on that day, after being at the office of Pell, Wallack & Co.?

A. I did.

Q. Where did you go from the office of Pell, Wallack & Co.?

A. I went back to the safe deposit company's vaults, and about two o'clock General Claassen returned there with $100,000 of the bonds; and later, just about three o'clock, a messenger came with 101,000 — of the bonds. The messenger at that time I did not know, but he has since testified here as Mr. Bailey.

Q. You recognize Bailey, who has been on the stand here, as the messenger who brought the 101 bonds?

A. Yes.

Q. Did you recover any of the other bonds?

A. I did not. They said that all the other bonds had been sold.

Q. Now state, if you please, in what condition the bank was, after you had recovered the 201,000 — of bonds and these coupons, on the 29th of January, after three o'clock.

Objected to as immaterial and irrelevant. Question allowed. Exception by defendant.

87 A. I found the bank without a legally qualified president and without a legally qualified board of directors and insolvent.

Q. To what extent?

A. Its capital and surplus were gone.

Q. And was there still a deficit that would have to be made up by the stockholders?

Objected to as immaterial and irrelevant. Question allowed. Exception by defendant.

A. Yes, sir; between $70,000 and $80,000.

The testimony in this case having been concluded on the 9th day of March, 1891, and the parties having rested this cause, the defendant submitted the following requests to charge, among others:

12th request. "That the fact that Pell was the financial agent of this defendant does not make this defendant criminally responsible for the acts of Pell."

28th request. "That no act of this defendant in reference to the bonds after they had been delivered by Claassen to Pell can, as a ratification of previous acts of either Claassen or Pell, make this defendant criminally liable under this indictment."

31st request. "That the jury must find a fraudulent intent before they can convict, and that the question of intent is a question of fact for the jury, to be determined upon by them upon a consideration of all the evidence in the case."

Thereupon the judge, on the 10th day of March, 1891, proceeded to charge the jury as follows:

88 *Charge.*

BENEDICT, *J.:*

GENTLEMEN OF THE JURY: At this late hour I shall not detain you in this case with any extended comment on the facts. Complicated as they are you will understand them as well as any person can, being business men, and the true significance of the testimony will be understood, I have no doubt, without any aid on my part. I have the right, under the laws of the United States, to give you my opinion on questions of fact, but I refrain from doing so because I am well satisfied of your capacity to understand what has been testified to in all these days that we have been here engaged. I shall confine myself to stating to you the law by which you are bound, simply calling your attention to the questions of fact which are to be decided by you, for, as you know, juries decide questions of fact, and not the court.

This is a prosecution for a violation of the laws of the United States relating to national banks. It is not an action for damages. The question whether the Sixth National bank was damaged, lost money, was paid back money that had been lost, or is in a better or in a worse condition by reason of what was done, is an immaterial matter. Nor is it a question whether the defendant lost money or made money by what he did. The question is whether he committed the offenses charged against him. If he did, he should

89 be found guilty whether he lost or gained money. Neither is Mr. Leland on trial here. Whether he did wisely or properly or legally in selling his stock in this bank as he did are matters of no sort of consequence. The indictment is against James A. Simmons, and he alone is on trial here under a law of the United States which declares that every president of a national banking association who embezzles or wilfully misapplies any of the moneys, funds, or credits of the association shall be guilty of an offense, and also declares that every person who, with intent to injure or defraud the associations, aids or abets any officer in any violation of this section shall also be deemed guilty of an offense. You will see that this statute puts the aider and the abettor upon the same footing with the president; it makes him equally guilty, subject to the same punishment, to be judged by the same rules. The reason of this provision of the law is obvious. It is to protect the officers of great trusts from being tempted to embezzle, for a national bank is a great trust, whether its capital be large or small. Owing to a change in our method of conducting business in late years, everybody now has his money in banks. A small bank is as important to a small locality as the great bank is to a great city; so that, in this great city, the failure of this little bank, with a capital of only $200,000, made trepidation; and so it is in every little country town. The priest or the physician of the town may die, the wealthy man of the town may be taken away, and it causes some remark,

perhaps; but let the bank fail, and alarm is everywhere and
90 business stops. It is no exaggeration to say that the welfare of this community is bound up in the welfare of the national banks; hence it is that this law has been provided, to the end that no man shall dare to induce or influence or instigate or procure the president of a national bank to embezzle its funds or to misapply its money.

There is evidence in this case of irregularities in the election of Peter J. Claassen to be president of the Sixth National bank, and that he never took the oath; but the proof is that he entered into and assumed the duties of president of the bank under color of an election; that he declared himself to be president and was recognized as president, was dealt with by the defendant as president, and did what he did with the funds and property of the bank in the capacity of president; that being so, he is within the scope of the statute, and the defendant is likewise within its scope in so far as he was an aider and a bettor of Claassen in doing what he did in the capacity of president; so you need not trouble yourself about the regularity of the election held at the bank on January 22nd, 1890, for it is not disputed that Claassen acted as president of the bank under the color of an election; that brings him within the statute, and it brings the defendant within the statute, notwithstanding there was irregularity in the election.

The indictment contains several counts, and each of these counts charges a separate offense. He may be found guilty of some of
91 these offenses and not guilty of others, or he may be convicted of all, or he may be acquitted of all if the evidence has failed to satisfy you of his guilt beyond a reasonable doubt. These counts charge that certain acts therein described were done by Claassen with intent to injure and defraud the bank, and that in doing these acts Claassen was aided and abetted by the accused with like intent, and the acts described in these counts must be proved as laid. The charges will perhaps be better understood if I first allude to some facts as to which I suppose there is no dispute.

Leland on the 17th of January owned a majority of the stock of the Sixth National bank, a bank shown to be a regularly established national bank and subject to the laws of the United States. On that day George H. Pell, acting in behalf of the accused and with his authority, made a contract to buy Leland's stock for the accused. By the agreement that stock was to be delivered on the 22nd of January on the payment of $673,000. On the 22nd the stock was delivered by Leland at the bank and Leland was then given certified checks on various banks, amounting in all to $673,000, some of the checks being over-certifications, as I understand the evidence. Very shortly—Claassen says within fifteen minutes after the checks were given—Claassen caused three checks of $60,000 each, one to the order of Simmons, one to the order of Satterlee & Co., a firm of which the accused was a member, and one to the order of
92 Pell, Wallack & Co., to be issued. The check drawn to the order of the accused and the check drawn to the order of Satterlee & Co. were at once endorsed by the accused, and all three

were paid out of the funds of the Sixth National bank. The check made to the order of the accused and which he then endorsed was on the same day deposited in the Commercial bank to his credit, a certified check on that bank for $100,000 having been given to Leland in payment of the stock transferred to the accused in the morning. The indictment in the second, third, and fourth counts charges that by causing these checks to be given out Claassen misapplied the moneys of the bank, and that he did this by the procurement and co-operation of Simmons. Whether these charges are true is a question presented to you by these three counts.

I will now explain the crime of misapplication. The crime of misapplying the moneys of a national bank is committed by the president of the bank when the money or property of the bank is converted by one who is *de facto* president, either to his own use or to the use of some person other than the bank, with intent to injure and defraud the bank, and the crime of aiding and abetting the president of a bank is committed when one not an officer of a bank, with a like intent, causes or procures such president to make such a conversion or aids him or co-operates with him in so doing.

The second and the fourth counts may be considered by themselves. These counts relate to the two checks, one to the order
93 of Satterlee & Co. and one to the order of Simmons. There is evidence that these two checks were issued by direction of Claassen. Simmons himself received and endorsed each of these checks. Simmons therefore obtained from the bank $120,000, through the action of Claassen, on the 22nd day of January, by means of these two checks. What was this transaction which resulted in transferring $120,000 of money from this bank away from its possession? What was the transaction? The accused says it was a loan of the bank's money negotiated by Pell without his knowledge and made by Claassen in the honest exercise of his discretion as president of the bank, for the advantage of the bank; and if you believe that such was the real nature of the transaction you should acquit the defendant on the second, the third, and the fourth counts. But calling a transaction a loan don't make it a loan. Many bad things are given good names, and often the form of an honest transaction is given to a dishonest transaction in order to conceal fraud. A bribe often takes the form of a loan or a game of cards or a contract for services. It is the real character of the transaction that is to be considered. Shams go for nothing. You may therefore properly consider whether the features of this transaction, calculated to liken it to a loan of money by a bank, are not mere sham; or you may consider the matter in a different light and inquire whether the transaction was a fraudulent loan. A known abuse of discretionary power in making a loan which it is known the
94 directors could not honestly sanction is a criminal misapplication of funds if done in bad faith for private gain and not in the exercise of an honest judgment. If therefore you conclude from the evidence that has been presented to you here that this transaction was a fraudulent loan made by Claassen to Simmons in pursuance of an understanding between Claassen, Pell, and Simmons that

when Claassen was made president he should by check or otherwise put Pell or Simmons in possession of the money of the bank, to which they had no right, in order to enable them to make good out of moneys of the bank checks to be given Leland in payment of the stock of the bank bought by Simmons, then you may find that the giving of these two checks for $60,000 each to Simmons by Claassen was a conversion by Claassen of the bank's money to the use of Simmons in fraud of the bank, and Simmons, who himself received and endorsed these two checks, an aider and abettor of Claassen in that conversion.

In determining the real character of and the good faith of this transaction, which is described in these counts for misapplication, you are called upon to consider on the one hand the testimony of Claassen and Simmons. They agree in stating that it was an honest loan and nothing else. The explanation they give of the important fact that no security whatever was taken when the money was parted with, namely, that Pell promised to provide securities, and the testimony of Claassen that the cashier of the bank advised him to do what he did, should also be noticed, which testimony is con-
95 tradicted by Colson, the cashier, who says he was not consulted in regard to this matter and gave no such advice; and you have also the fact that Simmons had become owner of a majority of the stock of the bank. Such ownership of the majority of the stock did not make Simmons an officer of the bank. It did not give him any power to direct the president of the bank. The board of directors could direct the president; Simmons could not, although he owned a majority of the stock of the bank. Nevertheless, the fact that he did own a majority of the stock of the bank is a fact to be taken into consideration when you determine whether this transaction was a real, honest, *bona fide* loan of the money of that bank for the sake of making interest for the bank, or whether it was a transfer of the bank's money to Pell and Simmons under the form of a loan made in bad faith and with intent to injure and defraud the bank.

On the other hand, you will consider the large amount of money parted with, the fact that substantially the first thing done by Claasen was to transfer this large sum of money to Simmons, and the fact that this large sum was paid over without, so far as appears, any consultation with any director and, if you believe the testimony of the cashier, without advising with him, and you should also consider the general aspect of the transaction as exhibited by the testimony. The fact that no security was taken at the time of parting with the money does not necessarily show fraud. Under the usage of the bank, which is proved, Claassen had au-
96 thority to make honest loans even without security, but that usage gave him no authority to abuse his discretionary power by making a loan, which he knew could not be honestly sanctioned by the directors, in bad faith, for private gain, and with intent to injure and defraud the bank. If Claassen did this thing through the procurement or co-operation of Simmons, knowingly given, Simmons was an aider and abetter of Claassen as charged in these

counts. I read, therefore, from the request made by the defendant in respect to my charge:

"Before you can find defendant guilty under the second count of the indictment you must find that Peter J. Claassen, on the 22nd day of January, 1890, did, wilfully and unlawfully and with intent to injure and defraud the Sixth National bank, misapply and convert to the use of defendant $60,000, and that the said bank was not then and there in any way secured therefor, and that said Simmons had no manner of right or title to receive the same, and—

"That defendant Simmons aided, abetted, counseled, and procured Claassen so to do."

This applies to all the counts for misapplication.

Part of the evidence in this case is a record of the trial of Claassen, where he was found guilty of committing precisely the same offenses which in this indictment Simmons is charged with having aided and abetted him in doing, and that record is put in by the defense.

97 This record may be considered by you to furnish *prima facie* evidence that Claassen did commit these crimes. It is not conclusive, but it is sufficient, in the absence of controlling evidence to the contrary, to justify a finding in this case that those crimes were committed by Claassen.

The use of this money or some part of it when obtained from the bank to pay the debts or obligations of Simmons does not make the act of obtaining the money criminal; but the fact that the money or some part of it was used to make good some of the checks given Leland may be considered by the jury in so far as it throws light on the real nature of the transaction and upon the question whether there was not a previous understanding between Simmons, Pell, and Claassen to use the money belonging to the bank for the purpose of paying the debts or obligations of Simmons. The fact that certain collaterals were brought to the bank on the 27th without demand made for the payment of the note is not to be overlooked by the jury, nor should they overlook the testimony as to the time when the collaterals were brought and their character and their value as disclosed by the evidence; and while there was no legal necessity for asking the consent of the board of directors to make any lawful loan, the fact that the matter was not presented to the board before it adjourned on the 22nd, together with the circumstances attending the transaction and the large amount of money parted with, are matters worthy the attention of the jury.

98 This is all I think it necessary for me to say to you in reference to the second and fourth counts. They differ from the third count because these two checks were actually endorsed by this defendant and came into his hands; he took the money in effect.

The third count also charges a misapplication, and I need not repeat what I have said about the crime. The transaction described in this count is the giving of the cashier's check for $60,000, which was drawn to the order of Pell, Wallack & Co. This check was not endorsed by Simmons as the other two were. Claassen and Colson say that Simmons was present and knew of the giving of this check

to Pell, his agents. Simmons says he knew nothing about it and was not there. Here is a question of credibility to be decided by the jury upon the proofs. Swearing to a thing does not prove the thing. It is swearing credibly. The question of credibility is to be determined by the jury, who should consider the appearance of the witness, the situation under which the testimony is given, and the probability or improbability of the story told; and it cannot be overlooked that Claassen has been convicted under the indictment put in evidence, and stands under that conviction as yet unsentenced, and that Simmons in testifying is testifying under the stress of a prosecution like this.

There is in this case, too, a question of knowledge on the part of Claassen and Simmons; and perhaps it will be sufficient for me on that point to simply read a very short sentence from an opinion of the Supreme Court of the United States when it is said of the court that "one who has reason to believe that a fact exists knows that it exists." Applying that to the evidence in this case, you will
99 be able to determine the question of knowledge. If Simmons was present and took part in the transaction and knew of the taking of this check made to the order of Pell, Wallack & Co. by Pell for his benefit at the time, his liabilities are the same as if he had personally taken the money. And here again I read the law from the Supreme Court of the United States:

"The principles asserted in all these cases is that whatever an agent does or says in reference to the business in which he is at the time employed and within the scope of his authority is done or said by the principal and may be proved as well in a criminal as in a civil case and in like manner as if the evidence applied personally to the principal."

Simmons says he was not at the bank when the check was issued—when any of the checks, I think, were issued.

He came in afterwards. He gives evidence here about his being at the trial of a case at the city hall that morning, and yet three witnesses testify that he went up with them to the Sixth National bank on the elevated railroad that morning, and Claassen narrates a striking conversation had with him in the train about Colson. It is your business to examine that testimony and see whether it can be reconciled by the suggestion that he went from the city hall to Cortlandt street. They say he met them at Cortlandt street. He says he did not take the train there, but took it at Park place. If he left the court-room and went to Cortlandt street he might have gone up, as they say, with them on the train; but if he did not go
to Cortlandt street at all and did not see them at all, then, of
100 course, he was not there at the time they say he was. This is a question of fact for you.

Mr. ROSE: Mr. Ripley testifies that he heard the order given for the checks and that Simmons was not present. You have not mentioned him.

Mr. NEWCOMBE: As Mr. Rose has interrupted you, will your honor allow me to suggest this: it probably has escaped your recollection that the testimony of Claassen, Watson, and Ripley was that they

left on the elevated train to go up shortly after ten o'clock, and that the trial here did not commence until half past ten.

The COURT: Yes; there is a trouble about the train, undoubtedly. The jury will see whether or not the testimony can be reconciled.

Simmons says he was not at the bank when the checks were issued; but Simmons may be held to be liable as if he had received the money personally if you find that it was given by Claassen to Pell in pursuance of an understanding between Simmons, Pell, and Claassen that Claassen when elected president should unlawfully give to Pell money of the bank to which he had no right to enable Pell to make good checks to be given Leland for the stock bought by Simmons. That proposition is based upon the law that where two or more persons conspire to commit an unlawful act every act and every word by either of the conspirators in furtherance of the common design is the word and deed of every one of them.

The fifth count, worded the sixth, is a charge for misapplication on the part of Claassen by converting money of the Sixth
101 National bank to the use, benefit, and advantage of the Lenox Hill bank by causing to be paid by the Sixth National bank at the clearing-house checks drawn on the Lenox Hill to the amount of $207,800 in excess of any amount which the Lenox Hill was entitled to have paid, and this with the intent to injure and defraud the Sixth National bank, and that this was done by the aid, direction, or procurement of Simmons. The amount is not important. According to the proof, $195,000 was the actual amount paid by the Sixth National bank at the clearing-house for checks on the Lenox Hill bank presented at the clearing-house on the 24th. There is but slight evidence, if, indeed, any evidence, showing a personal participation by Simmons in the act of making the Sixth National bank the clearing agent of the Lenox Hill and in paying the $195,000 checks of the Lenox Hill that were paid by the Sixth National bank at the clearing-house. You should not, therefore, convict the accused on this count unless you find that the checks of the Lenox Hill bank were paid by the Sixth National bank at the clearing-house in pursuance of an understanding between Simmons, Claassen, and Pell that Claassen when elected president of the Sixth National bank should enable Simmons, by himself or his agent, Pell, to obtain money of the Sixth National bank without right, and with such money so obtained make good checks to be given Leland in payment for the stock bought by Simmons; but if you find that such an understanding did exist, the act of Claassen in causing the Sixth National bank to become the clearing-
102 house agent of the Lenox Hill bank, and so liable to pay the $195,000 of checks on the Lenox Hill, may be found to be the act of Simmons as well as the act of Claassen. To render conspirators liable for acts done in pursuance of the common design by any one who is a party to the conspiracy, it is not necessary that all the details of the method by which the common design is finally carried into effect should have been agreed upon. It is sufficient if the common design was formed and the acts done were such as might reasonably be expected to be done in order to carry out that

common design. That is all that I think necessary to say to you on the question of misapplication.

I now pass to the first count, and that is for embezzlement. In this count it is charged that Claassen embezzled $622,000 of bonds of the bank, and that Simmons aided and abetted him; and I am requested by the defendant to charge you, and do charge you:

"Before you can find defendant guilty under the first count of the indictment you must find—

"(1st) That Peter J. Claassen, on the 23rd day of January, 1890, while acting as president of the Sixth National bank, embezzled the bonds set forth in the indictment and converted them or some of them to his own use; and

"(2nd) That the defendant James A. Simmons aided, abetted, counseled, and procured said Claassen to embezzle said bonds."

The ingredients of the crime of embezzlement are these:
103 First, the bonds must have been in the lawful possession of Claassen in his capacity as president of a national bank; second, Claassen must have wrongfully appropriated these bonds to his own use; third, he must have taken them without the knowledge or consent of the directors, and, fourth, with the intent to injure and defraud the bank. If the evidence has shown the commission of this offense by Claassen, at the instigation or by the aid, advice, direction, or procurement of Simmons, then Simmons may be convicted under this count. If Claassen gave the bonds to Pell in good faith and in the interest of the Sixth National bank, as he understood it, acting honestly and in pursuance of advice given him by Colson, then there was no embezzlement, however dishonest Pell may have been in dealing with the bonds after he had obtained them; and unless you find embezzlement by Claassen to be proved Simmons cannot be convicted of aiding and abetting under this count.

Part of this proof, which I have already called your attention to, bearing on this question of embezzlement, is the record put in by the defense—of the verdict of the jury in Claassen's trial that Claassen did embezzle these bonds. If you find that Pell, Simmons, and Claassen, owing to the failure on the 22nd to borrow money on the bank stock or to some other accident, determined, in order to provide for the checks given to Leland, to sell bonds belonging to the Sixth National bank and appropriate the proceeds for that purpose, and if you find that Claassen gave Pell the bonds in pursuance of such an understanding, then you may find the accused
104 to be an aider and abettor of Classen in the embezzlement of these bonds.

Intent to make restitution does not show absence of an intent to defraud. The intent to make restitution accompanies almost all frauds. The man who steals money, the bank officer who embezzles money, almost every class of persons that are guilty of crimes of this character, expect when they take the money to make restitution. That expectation does not change the act. The question is whether these parties converted these bonds to their own use at the time that they took the bonds. Although they may have intended to bring

back the money, although they may have intended that the bank should suffer no loss, yet if the bonds were then converted by them in bad faith, under the circumstances that I have indicated, then the crime of embezzlement was complete, although they may have intended to make the bank good and although the bank may have been made good.

I have limited this inquiry to acts done prior to the end of the 29th, for the reason that after the bank examiner had taken possession of the bank and closed it I cannot see that anything done after that, under such a change of circumstances, would aid us in determining whether or not there had been an intent to injure and defraud the bank by taking these bonds or taking the money.

Upon the count for embezzlement the question for you is whether the delivery of these bonds to Pell by Claassen was in pursuance of a common design between Simmons, Claassen, and Pell to obtain money for their own use by selling bonds belonging to the
105 Sixth National bank, not whether they intended to make restitution. Misapplication of the proceeds of the bonds by Pell cannot affect Simmons in the absence of any understanding between Claassen and Simmons that the bonds should be given to Pell in order that he might apply the proceeds to the use of Simmons, nor would the guarantee by Simmons that Pell would account for the bonds, to which Claassen testified, render Simmons criminally liable under this indictment; but the testimony of Claassen, if believed by you, is pertinent to the inquiry whether the bonds were not given to Pell by direction of Simmons in pursuance of such an understanding as has been described. So the fact that the proceeds of these bonds were used to meet checks and obligations of Simmons would not justify a conviction unless you find that it was in pursuance of an understanding to that effect between Simmons and Claassen and Pell that the bonds should be taken by Pell for that purpose. No act of the defendant in reference to the bonds after they had been delivered to Pell can be an act of aiding and abetting Claassen in embezzling the bonds, but such acts may be pertinent to the inquiry whether such an understanding as has been described existed in pursuance of which Claassen gave the bonds to Pell in order that they might be used for the benefit of Simmons. Take, as an illustration, the case of the thief who runs away under hue and cry. Running away is no crime; but when he is caught running away you infer from that what he was doing with the articles
106 which he had taken. So what was done after the bonds were taken by Pell may throw light on what had been done before, although what was done after is not a crime. If you believe that Claassen honestly delivered the bonds to Pell because of the guarantee of Pell by Simmons and in the honest belief that Pell would sell the bonds in the interest of the Sixth National bank and would account to the bank for the proceeds, then Claassen was not guilty of embezzling the bonds and Simmons cannot be found guilty under this count; but if Claassen knew when he gave the bonds to Pell that the proceeds of the bonds were to be applied to provide for checks and obligations of Simmons, and Simmons advised Claassen

to give the bonds to Pell in order that the proceeds might be so used, and it was in pursuance of such an understanding and with intent to injure and defraud the bank that this was done, then Simmons may be convicted under this count. This is all that I think it necessary to say to you in reference to the particular charge of embezzlement.

There is one element of the offenses charged, a very important one, to which I have made no allusion, and that is the question of intent. It is the intent that makes the act criminal; the intent to injure and defraud the bank must accompany the acts done. This giving of this money of the 22nd, this giving of these bonds to Pell, must have been accompanied by an intent on the part of the givers to injure and defraud the bank. I cannot do better than to read from an adjudged case in a prosecution similar to this, under
107 the same statute, what a very learned judge says upon the important question of the intent to injure and defraud the bank, which is a necessary element of the offense, to be found as a question of fact by the jury: "What is required in order to establish this intent to 'injure and defraud' the association? In directing that these offenses or the acts which constitute them must be committed with intent to injure or defraud the bank the statute does not mean that it must be made to appear that the party accused had malice or ill will towards the association. These terms, as used in the statute, mean nothing more than that general intent to injure or defraud which may always be presumed when one willfully or intentionally does that which is illegal or fraudulent, and which, in its necessary and natural consequence, must injure another; so that while these offenses of embezzling and of wilfully misapplying the moneys, funds, or credits of the bank must be committed by the accused with intent to injure or defraud the association, that intent may be shown by proof of the doing of the wrongful, fraudulent, and illegal acts which, in their necessary results, naturally produce loss or injury to the association. it is to be presumed that every man intends the legitimate consequences of his acts. Wrongful acts knowingly or intentionally committed can neither be justified or excused on the ground of innocent intention. The intent to injure or defraud is presumed when the unlawful act — would result in loss or injury is proved to have been knowingly committed.
108 This is the well-settled rule for the guidance of the jury upon the question of intent in both civil and criminal cases involving the question of intent. Human affairs could hardly be conducted nor civil order be preserved under any other. If, therefore, the funds, moneys, or credits of the bank are shown to have been either embezzled, wilfully misapplied, as already explained, by the accused and converted as charged, whereby, as a necessary, natural, or legitimate consequence, the association's capital is reduced or placed beyond control of its directors or its ability to meet its engagements or obligations or to continue its business is lessened or destroyed, the intent to injure or defraud the bank may be presumed. Acts involving such consequences, when knowingly and wrongfully committed, unless satisfactorily explained, establish not

only the guilty intent to injure or defraud mentioned in the statute, but they disclose moral turpitude utterly inconsistent with an innocent intent."

Those words will be sufficient to make you understand what the nature of that element of this offense is, which element is to be found by the jury in reference to each one of these charges.

I am requested to charge on the subject of reasonable doubt. The law, as has been stated, is that in a criminal case the accused cannot be convicted unless the jury is satisfied of his guilt beyond a reasonable doubt, and I read the fourth, fifth, sixth, and fourteenth requests:

109 "It is the duty of the jury to acquit the defendant unless the evidence satisfied them that the defendant is guilty of one or more of the crimes charged beyond a reasonable doubt."

"The reasonable doubt which would make it the duty of the jury to acquit the defendant may arise from improbability that defendant would have entered into an agreement to commit one or more of the crimes charged."

That whether there is a reasonable doubt of the defendant's guilt is a question asked of the judgment and conscience of each individual juror, and no verdict should be rendered unless the jury agree that the defendant's guilt is shown beyond a reasonable doubt.

"That each essential item or component part of each of the offenses charged be proved"——

The word "item" should be "element" or "ingredient."

"That each essential ingredient of the offences charged must be proved in the same manner as if the whole issue under each count rested on it; otherwise the defendant is entitled to an acquittal under the count or counts as to which such failure of proof exists."

"That if the conduct of the defendant is upon a reasonable hypothesis consistent with his innocence the jury must acquit."

What was read by the district attorney in regard to reasonable doubt may, perhaps, be read again, for I think it is very well expressed.

"The court will say for your instruction and guidance that speculative notions or possibilities resting upon mere conjecture—
110 not arising or deducible from the proof—should not be confounded with what is meant by a 'reasonable doubt.' A doubt suggested by the ingenuity of counsel or by your own ingenuity, not legitimately warranted by the testimony, or one born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him or those connected with him, is not what is meant by a 'reasonable doubt.' On the contrary, a reasonable doubt, as that term is employed in the administration of criminal law, is an honest, substantial misgiving generated by the insufficiency of the proof—an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused. If the whole evidence when carefully examined, weighed, and compared produces in your mind a settled conviction as you would be willing to

act upon in the more weighty and important matters relating to your own affairs you are free from any reasonable doubt and should find a verdict in accordance with that conviction or belief. As already stated, it is not required either that the evidence shall establish or that you should have an absolute certainty of the prisoner's guilt, but merely that degree of certainty and belief with which you would transact your own affairs of moment or would feel safe in acting upon in matters of the highest concern in respect to your own personal interest—it could not be said that you had any reasonable doubt."

111 There remains to speak about good character. There is evidence in this case that the accused has good character, and there is no evidence to the contrary. A man is not to be acquitted because he has borne a good character, but because his good character has raised reasonable doubt as to his guilt. If, therefore, in this case there is evidence of good character, such evidence of good character as to raise a reasonable doubt as to the guilt of the offender, the accused is entitled to be acquitted, and I read, therefore, the seventh request.

The COURT: "The previous good character of defendant, if clearly established by uncontradicted evidence, may in itself be sufficient to create a reasonable doubt of the defendant's guilt and entitle him to an acquittal.

"That good character, like all other facts in the case, should be considered by the jury; and if, therefore, a reasonable doubt is generated in the minds of the jury as to the guilt of the defendant, it is their duty to acquit."

I also give one other. I think I have already given it substantially, but I repeat it:

"The evidence given upon this trial is the only source of information to which the jury can refer, and the question to be determined by the jury is, Does the evidence introduced upon this trial satisfy you beyond a reasonable doubt that the defendant is guilty of one or more of the crimes charged? If it does not so satisfy you, it is your duty to acquit the defendant."

112 I add that a part of the evidence is the record of the finding of the jury in Claassen's case that he was guilty of the various offenses which are charged in this indictment to have been committed by him.

And now, gentlemen, I think of no other matter which it is necessary to instruct you in regard to, nor will I delay you at this hour by saying anything calculated to make you realize the importance of this duty to be discharged by you. It can hardly be exaggerated. It will be felt, I am sure, by every one of you. It is necessary in prosecutions of this kind that the law should be enforced. I do not mean by that that every defendant should be found guilty, for the law is only enforced when a man is found guilty on proofs required by law. If you are satisfied that the proofs here are sufficient to accomplish that end, then it is your duty to convince this man; and, if you are not satisfied, you should acquit him.

113 Mr. NEWCOMBE: I except to that portion of your honor's charge in which you charged that Claassen and the defendant were within the scope of the statute, section 5209, because Claassen has assumed to act as president.

The particular portion of this charge to which this exception is intended to be applied is as follows:

"There is evidence in this case of irregularities in the election of Peter J. Claassen to be president of the Sixth National bank, and that he never took the oath; but the proof is that he entered into and assumed the duties of president of the bank under color of an election; that he declared himself to be president and was recognized as president, was dealt with by the defendant as president, and did what he did with the funds and property of the bank in the capacity of president. That being so, he is within the scope of the statute, and the defendant is likewise within its scope in so far as he was an aider and abettor of Claassen in doing what he did in the capacity of president. So you need not trouble yourself about the regularity of the election held at the bank on January 22nd, 1890, for it is not disputed that Claassen acted as president of the bank under the color of an election. That brings him within the statute, and it brings the defendant within the statute, notwithstanding there was irregularity in the election."

The COURT: That is the same point that you took on the trial?

114 Mr. NEWCOMBE: Yes, sir; I think your honor has charged substantially our requests. They are quite voluminous and it may be that you may not have charged them all. Will your honor permit me to take an exception?

The COURT: You may now take an exception to my refusal to charge anything in those requests that has not been charged. The defendant's counsel insisted that the 12th, 28th, and 31st requests, as hereinbefore set forth, had not been charged and excepted to the refusal of the judge to charge the same.

The jury then retired.

Thereafter the jury came into court at 10.30 p. m. on March 10th, 1891, and the following proceedings were had:

The COURT: I understand that you desire me to repeat my charge as to the first count. The first count is the charge of embezzlement of the bonds, of the bonds taken from the bank vaults and delivered to Pell. The ingredients of the crime of embezzlement are these:

(1.) The bonds must have been in the lawful possession of Claassen in his capacity as bank president. They were in the vaults and he had the key.

(2.) Claassen must have wrongfully appropriated those bonds to his own use—that is, he must have taken the bonds for his own purpose and not for the purposes of the bank.

(3.) He must have taken them without the knowledge or

115 consent of the directors. There is no evidence of any knowledge or consent on the part of the directors that those bonds should be given to Pell.

(4.) He must have done that with the intent to injure and defraud the bank. If the evidence has shown the commission of this offense by Claassen at the instigation or by the aid, advice, direction, or procurement of Simmons, then Simmons may be convicted under this count.

Is that sufficient, or do you care to have the whole?

The FOREMAN: We would like to have it all.

The COURT: If Claassen gave the bonds to Pell in good faith and in the interest of the Sixth National bank, as he understood it, acting honestly and in pursuance of advice given him by Colson, then there was no embezzlement, however dishonest Pell may have been in dealing with the bonds after he obtained them, and unless you find the embezzlement of the bonds by Claassen to be proved Simmons cannot be convicted under this count; but there is in the record, in the proof, evidence of the verdict of the jury in Claassen's case convicting him of having embezzled the bonds, and if you find that Pell, Simmons, and Claassen, impelled by the failure of the 22nd to borrow money on the bank stock or by any other accident, had determined, in order to provide for the checks going to Leland, to sell bonds belonging to the Sixth National bank and to appropriate the proceeds for that purpose, and if you find that Claassen gave Pell the bonds in pursuance of such an understanding, then you may find the accused to be an aider and abettor of Claassen in the embezzlement of those bonds. The intent to make restitution does not show absence of an intent to defraud.

116

The jury then retired again.

Thereafter and at 11.45 a. m., March 11th, 1891, the court directed the said jury to be brought in, and the following proceedings were had:

The COURT: I have received your communication, in which you express a desire to be discharged from further consideration in the case. Is there any point of law upon which I could assist you?

There being no reply to this question to the jury, the court proceeded as follows:

This case has occupied a long time. It is a case of importance, and the discharge of the jury at this time would involve another trial. It seems to me that that should not be had unless in a case of necessity. I see in this case no such necessity. I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. Wherever in the opinion of the court the testimony is convincing it is the duty of the court to hold the jury together. Therefore I must decline your request to be discharged. I shall be unable to remain in this building during the day, having to hold court elsewhere, but I will direct that word be sent to me when you do agree, and whenever you agree send me word by a messenger, and I will be present to receive your verdict. Follow the officer.

117

Mr. NEWCOMBE: I except to your honor's statement to the jury that you regard the testimony as convincing.

Thereafter the jury came into court, at 11.15 p. m., on March 11th, 1891.

The CLERK: Gentlemen of the jury, have you agreed upon your verdict?

The FOREMAN: We have.

The CLERK: How say you? Do you find the defendant guilty or not guilty as charged in the indictment?

The FOREMAN (reading): "We, the undersigned jurors, find James A. Simmons guilty of the first count of the indictment, and find him not guilty of the other four counts, and we do recommend the mercy of the court in his behalf."

Counsel for the defendant then moved that the verdict be set aside on the ground that it was procured by reason of the judge's act to-day in directing the jury that there was conclusive evidence existing before him that the crime had been committed.

Which motion was denied and exception duly taken by counsel for the defendant.

The foregoing contains so much of the evidence and proceedings herein as is necessary to entitle the defendant to raise, argue, and have determined the several exceptions taken.

And, inasmuch as the matters, proceedings, things, and ex-
118 ceptions aforesaid would not otherwise appear by the record, I have settled, allowed, and signed this bill of exceptions on the prayer of said defendant by his counsel.

It is ordered that the same be filed as a part of the record herein, with like force and effect as if the same had been reduced to writing, signed, and filed before the case was given to the jury and at the time when the several exceptions were respectively taken.

Witness my hand, at the city of New York, in the southern district of New York, this twenty-ninth day of June, A. D. 1891.

CHARLES L. BENEDICT.

(Endorsed:) United States circuit court, southern district of New York. United States of America *vs.* James A. Simmons. Bill of exceptions. Richard S. Newcombe and J. J. Joyce, attorneys for James A. Simmons. U. S. circuit court. Filed Jun-26, 1891. John A. Shields, clerk.

119 United States Supreme Court.

JAMES A. SIMMONS, Plaintiff in Error,
vs.
UNITED STATES, Defendant in Error. } Assignment of Errors.

Afterwards, to wit, on the 26th day of June, in the year of our Lord 1891, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, in the District of Columbia, comes the said James A. Simmons, by Richard S. New-

combe and John J. Joyce, his attorneys, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

First. That the circuit court of the United States for the southern district of New York erred in not acquitting and discharging the defendant upon the discharge of the first jury duly empaneled and sworn to try the issue on the indictment herein before verdict rendered.

Second. That the said court erred in not permitting the defendant to file a plea in bar of a trial of the same issue before a second jury because of the discharge before verdict of the first jury empaneled and sworn to try said issue on the ground that the defendant had been before put in jeopardy by the trial had before said first jury.

120 Third. That the said court erred in admitting any evidence as to the acts of Peter J. Claassen on the ground that he was not a legally qualified officer of a national bank, and that without evidence of said Claassen's acts the defendant could not be convicted, it being in evidence that said Claassen never qualified as a director himself and was not elected president by directors who had qualified as such.

Fourth. Andrew E. Colson, the cashier of the Sixth National bank, having testified that on the 28th day of January, 1890, the bank received $50,000 in money on account of the $622,000 of bonds which had been delivered by Claassen to Pell, Wallack & Company, the witness was asked on cross-examination whether anything in addition to the money spoken of on his direct examination had been received on account of the said bonds. Whereupon, objection being made unless the time was limited to the close of business on the 29th of January, 1890, the said court sustained the objection and refused to admit evidence as to what had been given to the said bank on account of said bonds after the close of business on the said 29th day of January; and thereupon the defendant excepted and the said court erred in said refusal.

Fifth. Alonzo B. Hepburn, a national bank examiner, being examined as a witness for the plaintiff, and having testified that he had recovered 201 of the 622 bonds belonging to the Sixth National bank, was asked:

121 Q. Now state, if you please, in what condition the bank was after you had recovered the 201,000 of bonds on the 29th of January after three o'clock.

Objected to as immaterial and irrelevant. Question allowed. Exception by defendant.

A. I found the bank without a legally qualified president and without a legally qualified board of directors and insolvent.

And the said court erred in admitting said testimony.

Sixth. The said Alonzo B. Hepburn, as a witness for the plaintiff, having also testified that the Sixth National bank at the close of

business on January 29th, 1890, was insolvent, and that its capital and surplus were gone, was asked:

Q. And was there a deficit that would have to be made up by the stockholders?

Objected to as immaterial and irrelevant. Question allowed. Exception by defendant.

A. Yes, sir; between $70,000 and $80,000.

And the said court erred in admitting said testimony.

Seventh. The said court erred in charging the jury as follows:

"There is evidence in this case of irregularities in the election of Peter J. Claassen to be president of the Sixth National bank, and that he never took the oath, but the proof is that he entered into and assumed the duties of president of the bank under color of an election; that he declared himself to be president and was recog-

122 nized as president, was dealt with by the defendant as president, and did what he did with the funds and property of the bank in the capacity of president. That being so, he is within the scope of the statute, and the defendant is likewise within its scope, in so far as he was an aider and abettor of Claassen in doing what he did in the capacity of president; so you need not trouble yourself about the regularity of the election held at the bank of January 22nd, 1890, for it is not disputed that Claassen acted as president of the bank under the color of an election. That brings him within the statute, and it brings the defendant within the statute, notwithstanding there was irregularity in the election."

Eighth. The said court erred in refusing to charge the jury the 12th request of defendant, as follows:

"That the fact that Pell was the financial agent of this defendant does not make this defendant criminally responsible for the acts of Pell."

Ninth. That the court erred in refusing to charge the jury the 28th request of defendant, as follows:

"That no act of this defendant in reference to the bonds after they had been delivered by Claassen to Pell can as a ratification of previous acts of either Claassen or Pell make this defendant criminally liable under this indictment."

Tenth. The said court erred in refusing to charge the jury the 31st request of defendant, as follows:

"That the jury must find a fraudulent intent before they can convict, and that the question of intent is a question of fact for the jury, to be determined by them upon a consideration of all the evidence in the case."

123 Eleventh. The said court erred in making the following statement to the jury upon their coming into court and requesting to be discharged because of inability to agree upon a verdict:

"This case has occupied a long time. It is a case of importance, and the discharge of the jury at this time would involve another

trial. It seems to me that that should not be had unless in a case of necessity. I see in this case no such necessity. I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. Wherever, in the opinion of the court, the testimony is convincing, it is the duty of the court to hold the jury together; therefore I must decline your request to be discharged."

Twelfth. The jury having brought in a verdict of guilty on the first count of the indictment, the said court erred in not setting aside the verdict on the ground that it was procured by the judge's directing the jury that there was conclusive evidence existing before him that the crime had been committed, the counsel for the defendant having so moved and having taken exception to the denial of the motion.

And the said James A. Simmons prays that the judgment, conviction, and sentence aforesaid may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said conviction, judgment, and sentence.

RICHARD S. NEWCOMBE,
96 *Broadway, New York City,*
JOHN J. JOYCE,
Attorneys for Pl'ff in Error,
11 *Wall St., New York City.*

124 Endorsed: United States Supreme Court. James A. Simmons, plaintiff in error, *vs.* United States, defendant in error. Assignment of errors. Service of a copy of within assignments of error acknowledged this 26th day of June, 1891. Edward Mitchell, U. S. attorney. U. S. circuit court. Filed Jun- 26, 1891. John A. Shields, clerk.

125 Supreme Court of the United States.

JAMES A. SIMMONS, Plaintiff in Error,
against
THE UNITED STATES OF AMERICA, Defendant in Error. } Joinder in Error.

And afterwards, to wit, on the 24th day of July, 1891, the said defendant in error, by Edward Mitchell, its attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And *he* prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

EDW'D MITCHELL,
Attorney for Defendant in Error.

126 [Endorsed:] United States Supreme Court. James A. Simmons, plaintiff in error, *vs.* The United States of America, defendant in error. Joinder in error. Edward Mitchell, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 2nd day of July, 1891. Richard S. Newcombe, attorney for plaintiff in error. To ——— ———, attorney for plaintiff in error.

(File-mark:) U. S. circuit court. Filed July 2, 1891. John A. Shields, clerk.

127 UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the 24th day of July next, pursuant to a writ of error allowed and served, directed to the honorable the judges of the circuit court of the United States for the southern district of New York, and an assignment of error filed in the clerk's office of said court, wherein James A. Simmons is the plaintiff in error and The United States of America the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 26th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

CHAS. L. BENEDICT.

128 [Endorsed:] E. & A. B. 1013. United States Supreme Court. James A. Simmons, plaintiff in error, *vs.* United States of America, defendant in error. Citation. Rich'd S. Newcombe, John J. Joyce, att'ys for pl'f in error. Service of a copy of within citation is acknowledged this 26th day of June, 1891. Edward Mitchell, U. S. attorney. U. S. circuit court. Filed Jun- 26, 1891. John A. Shields, clerk.

[Endorsed:] Supreme Court of the United States. James A. Simmons, plaintiff in error, *vs.* The United States of America, defendant in error. Return to writ of error.

Endorsed on cover: Case No. 14,770. S. New York C. C. U. S. No. 1296. James A. Simmons, plaintiff in error, *vs.* The United States. Filed July 24, 1891.

Office Supreme Court U. S.
FILED.
DEC 4 1891
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1891.

TERM NO. 1296.

JAMES A. SIMMONS,

Plaintiff in Error,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

SAMUEL SHELLABARGER,
JOHN JAY JOYCE,
Counsel for Plaintiff in Error.

Evening Post Job Printing House, New York.

Supreme Court of the United States.

James A. Simmons vs. The United States.	In Error.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

Statement of the Case.

On the 7th day of October, A. D. 1890, a bill of indictment, consisting of five counts, was found against James A. Simmons, the plaintiff in error, in the Circuit Court of the United States for the Southern District of New York, under Section 5209 of the Revised Statutes of the United States, for aiding and abetting one Peter J. Claassen in embezzling and misapplying the funds of the Sixth National Bank of the City of New York; and on the 13th day of October, 1890, the said Simmons was arraigned and pleaded not guilty. On the 26th day of January, 1891, the trial of the said indictment was begun before the Honorable Charles L. Benedict, and continued on successive days, a jury being duly impaneled and sworn to try said issue, the case being opened by the attorney of the United States, and witnesses being duly sworn and examined to

maintain and prove said issue on the part of the United States. Said trial duly progressed until the 9th day of February, 1891, and upon said last-mentioned day, the attorney for the United States, moved to withdraw a juror and read in support of his motion an affidavit (Record, p. 22) to show that one of the jurors impaneled in said case was acquainted with the said Simmons, although said juror had sworn on his *voir dire* (Record, p. 24) that he had no acquaintance with said defendant Simmons; and also, in support of said motion, read a letter (Record, p. 15) written by one of the counsel of said Simmons, and addressed to said District Attorney, dated the 6th day of February, 1891, copies of which letter were by said counsel furnished to certain newspapers in the City of New York, and by said newspapers published on the morning of the 7th day of February, 1891. In opposition to said motion the counsel for the defendant below read the affidavit of said Simmons (Record, p. 25) denying that he had ever known said juror; and also his own affidavit (Record, p. 26) showing that the information contained in said letter had been first communicated to the press by an assistant in said District Attorney's office; said juror was not permitted to make any statement (Record, p. 30). The Court thereupon granted the motion of the District Attorney and ordered a juror to be withdrawn and the jury discharged, and the counsel for the defendant excepted to said order. And the counsel for the defendant thereupon moved for the acquittal of the defendant because of the discharge of the said jury as aforesaid, but his Honor, the said Judge, denied said last-mentioned motion, whereupon the counsel for the defendant excepted to the denial of the last motion aforesaid, and set down the trial of said indictment for the 12th day of February, 1891; and upon said last mentioned day the counsel for the defendant moved the said Court for permission to file a plea in bar on the ground of former jeopardy, because of the discharge, before verdict as aforesaid, of the first jury impaneled and sworn to try said indictment, said plea (Record, p. 30) set forth the said indictment and all the

proceedings theretofore had in said case, and the circumstances connected with the discharge of said first jury as aforesaid, and prayed the judgment of the Court if he ought to be put to further answer, and that he may be dismissed the court and go without day. The said District Attorney objected to the motion to file said plea, and the said Judge denied the said motion, whereupon the counsel for the defendant excepted to the denial of said motion.

The testimony shows that Claassen, whom as an officer of said bank, the defendant below was accused of aiding and abetting, was elected a director of said bank by those who at the time of said election were the owners of no stock therein, either in fact or in name, and that he, Claassen, never qualified as such director by taking the oath of office required by Section 5147 of the Revised Statutes of the United States, and the defendant's counsel objected on the above ground to the admission of evidence of any of the acts of Claassen as being the acts of an officer of said bank, which objection the Court overruled and allowed an exception.

The cashier of said bank, as a witness for the plaintiff below, testified that on the 28th of January, 1890, the bank received $50,000 on account of the $622,000 of bonds which are delivered by said Claassen to George H. Pell, and which are the bonds specified as having been embezzled in the first count of said indictment, and upon the cross-examination of said witness he was asked: "Did you receive anything in addition to the money spoken of by you on your direct-examination on account of the 622 bonds?" This question was objected to by the District Attorney, unless the time is limited to the close of business on the 29th of January, 1890, the objection was sustained and the defendant excepted.

Alonzo B. Hepburn was sworn on the part of the Government and testified that he was a National bank examiner on the 29th of January, 1890, and that on that date he made an examination of the books, assets and affairs

of said Sixth National Bank, and that he had gotten back on the 29th of January, 1891, 201 of the bonds alleged in the indictment to have been embezzled. He was then asked the question: "Now state in what condition the bank was, after you had recovered the 201,000 of bonds on the 29th of January after three o'clock," and over the objection of the defendant this question was allowed, to which the defendant's counsel excepted, which same objection, ruling and exception were taken and made to the question put to the witness: "And was there still a deficit that would have to be made up by the stockholders?" The answer to which was "yes, sir; between $70,000 and $80,000."

On the 10th day of March, 1891, the Court charged the jury to certain specific parts, of which charge exceptions were taken by defendant's counsel, as likewise to refusal to charge certain requests. The jury returned into Court at 10.30 P. M. on March 10, 1891, for additional instructions, and again at 11.45 A. M., on March 11, 1891, the jury came into court with a request to be discharged, which request the Court refused, and informed the jury that in the opinion of the Court the testimony was convincing, to which statement the defendant's counsel excepted, and at 11.15 P. M., on said last-mentioned day the jury came into court with a verdict of guilty on the first count of said indictment, not guilty of the other four counts, and with a recommendation to the mercy of the Court in behalf of said defendant. The defendant's counsel thereupon moved that the verdict be set aside on the ground that it was procured by the Judge's act in directing the jury that the evidence was conclusive, which motion was denied and exception taken, and defendant was then remanded to the custody of the United States marshal for said district. On the 26th day of June, 1891, the Court sentenced said defendant to be imprisoned for a period of six years in the Erie County Penitentiary, and on the same day a writ of error on behalf of said defendant, to operate as a supersedeas, and stay of execution was issued out of the Supreme Court of the United States, directed to the United

States Circuit Court for said district. A bill of exceptions was settled and signed, and a citation and assignment of errors served on the said District Attorney, and filed in the said Circuit Court.

Specification of Errors.

FIRST.—That the Circuit Court of the United States for the Southern District of New York erred in not acquitting and discharging the defendant upon the discharge of the first jury, duly impaneled and sworn to try the issue on the indictment herein, before verdict rendered.

SECOND.—That the said Court erred in not permitting the defendant to file a plea in bar of a trial of the same issue before a second jury, because of the discharge before verdict of the first jury impaneled and sworn to try said issue, on the ground that the defendant had been before put in jeopardy by the trial had before said first jury.

THIRD.—That the said Court erred in admitting any evidence as to the acts of Peter J. Claassen on the ground that he was not a legally qualified officer of a National bank, and that without evidence of said Claassen's acts, the defendant could not be convicted, it being in evidence that said Claassen never qualified as a director, himself, and was not elected president by directors who had qualified as such.

FOURTH.—Andrew E. Colson, the cashier of the Sixth National Bank, having testified that on the 28th day of January, 1890 the bank received $50,000 in money, on account of the $622,000 of bonds which had been delivered by Claassen to Pell, Wallack & Co., the witness was asked on cross-examination whether anything in addition to the money spoken of on his direct-examination had been received on account of the said bonds. Whereupon objec-

of said Sixth National Bank, and that he had gotten back on the 29th of January, 1891, 201 of the bonds alleged in the indictment to have been embezzled. He was then asked the question: "Now state in what condition the bank was, after you had recovered the 201,000 of bonds on the 29th of January after three o'clock," and over the objection of the defendant this question was allowed, to which the defendant's counsel excepted, which same objection, ruling and exception were taken and made to the question put to the witness: "And was there still a deficit that would have to be made up by the stockholders?" The answer to which was "yes, sir; between $70,000 and $80,000."

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States Circuit Court for said district. A bill of exceptions was settled and signed, and a citation and assignment of errors served on the said District Attorney, and filed in the said Circuit Court.

Specification of Errors.

FIRST.—That the Circuit Court of the United States for the Southern District of New York erred in not acquitting and discharging the defendant upon the discharge of the first jury, duly impaneled and sworn to try the issue on the indictment herein, before verdict rendered.

SECOND.—That the said Court erred in not permitting the defendant to file a plea in bar of a trial of the same issue before a second jury, because of the discharge before verdict of the first jury impaneled and sworn to try said issue, on the ground that the defendant had been before put in jeopardy by the trial had before said first jury.

THIRD.—That the said Court erred in admitting any evidence as to the acts of Peter J. Claassen on the ground that he was not a legally qualified officer of a National bank, and that without evidence of said Claassen's acts, the defendant could not be convicted, it being in evidence that said Claassen never qualified as a director, himself, and was not elected president by directors who had qualified as such.

FOURTH.—Andrew E. Colson, the cashier of the Sixth National Bank, having testified that on the 28th day of January, 1890 the bank received $50,000 in money, on account of the $622,000 of bonds which had been delivered by Claassen to Pell, Wallack & Co., the witness was asked on cross-examination whether anything in addition to the money spoken of on his direct-examination had been received on account of the said bonds. Whereupon objec-

tion being made unless the time was limited to the close of business on the 29th of January, 1890, the said Court sustained the objection and refused to admit evidence as to what had been given to the said bank on account of said bonds after the close of business on the said 29th day of January, and thereupon the defendant excepted, and the said Court erred in said refusal.

FIFTH.—Alonzo B. Hepburn, a National bank examiner, being examined as a witness for the plaintiff, and having testified that he had recovered 201 of the 622 bonds belonging to the Sixth National Bank was asked:

Q. Now state, if you please, in what condition the bank was after you had recovered the $201,000 of bonds, on the 29th of January, after three o'clock?

Objected to as immaterial and irrelevant. Question allowed. Exception by defendant.

A. I found the bank without a legally qualified president, and without a legally qualified Board of Directors, and insolvent. And the said Court erred in admitting said testimony.

SIXTH.—The said Alonzo B. Hepburn, as a witness for the plaintiff, having also testified that the Sixth National Bank at the close of business on January 29, 1890, was insolvent, and that its capital and surplus were gone, was asked:

Q. And was there a deficit that would have to be made up by the stockholders?

Objected to as immaterial and irrelevant. Question allowed. Exception by defendant.

A. Yes, sir; between $70,000 and $80,000. And the said Court erred in admitting said testimony.

SEVENTH.—The said Court erred in charging the jury as follows:

"There is evidence in this case of irregularities in the election of Peter J. Claassen to be president of the Sixth

National Bank, and that he never took the oath; but the proof is that he entered into and assumed the duties of president of the bank under color of an election; that he declared himself to be president and was recognized as president, was dealt with by the defendant as president, and did what he did with the funds and property of the bank in the capacity of president. That being so he is within the scope of the statute; and the defendant is likewise within its scope in so far as he was an aider and abetter of Claassen in doing what he did in the capacity of president. So you need not trouble yourself about the regularity of the election held at the bank of January 22, 1899, for it is not disputed that Claassen acted as president of the bank, under the color of an election. That brings him within the statute and it brings the defendant within the statute, notwithstanding there was irregularity in the election."

EIGHTH.—The said Court erred in refusing to charge the jury the twelfth request of defendant, as follows:

"That the fact that Pell was the financial agent of this defendant does not make this defendant criminally responsible for the acts of Pell."

NINTH.—That the Court erred in refusing to charge the jury the twenty-eighth request of defendant, as follows:

"That no act of this defendant in reference to the bonds after they had been delivered by Claassen to Pell can as a ratification of previous acts of either Claassen or Pell make this defendant criminally liable under this indictment."

TENTH.—The said Court erred in refusing to charge the jury the thirty-first request of defendant, as follows:

"That the jury must find a fraudulent intent before they can convict, and that the question of intent is a question of fact for the jury to be determined by them upon a consideration of all the evidence in the case."

ELEVENTH.—That said Court erred in making the following statement to the jury upon their coming into court, and requesting to be discharged because of inability to agree upon a verdict:

"This case has occupied a long time; it is a case of importance, and the discharge of the jury at this time would involve another trial. It seems to me that that should not be had, unless in a case of necessity. I see in this case no such necessity. I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. Wherever in the opinion of the Court the testimony is convincing, it is the duty of the Court to hold the jury together; therefore, I must decline your request to be discharged."

TWELFTH.—The jury having brought in a verdict of guilty on the first count of the indictment, the said Court erred in not setting aside the verdict, on the ground that it was procured by the Judge's directing the jury that there was conclusive evidence existing before him that the crime had been committed. The counsel for the defendant having so moved, and having taken exception to the denial of the motion.

And the said James A. Simmons prays that the judgment, conviction and sentence aforesaid may be reversed, annulled and altogether held for naught, and he may be restored to all things which he hath lost by occasion of the said conviction, judgment and sentence.

Points and Authorities.

The plaintiff in error was entitled to be acquitted and discharged upon the discharge of the first jury in the Court below.

This Court will not inquire into the question of fact involved in the conflicting affidavits of Ward (Record, p. 22), Simmons (p. 25), Newcomb (Rec., p. 26), and the examination of Goodnow (Rec., p. 23), but only whether as a matter of law the discharge of the jury before verdict, and against the objection of the defendant, and under the circumstances in the record set forth on the motion of the District Attorney after said jury had been impaneled and sworn, the case opened and witnesses sworn and examined on the part of the Government, acted as a discharge of the defendant below.

And first, will a court of error review the decision of the trial Court, withdrawing a juror on a motion made by the District Attorney?

The right of the trial Court to discharge the jury before verdict is to exist in cases of "extreme and absolute necessity" (People *v.* Goodwin, 18 John., 187), "inevitable necessity" (Mitchell *v.* State, 42 Ohio, 383, 393), "legal necessity" (Nolan *v.* State, 55 Ga., 521), "imperative necessity" (McCorkle *v.* State, 14 Ind., 40), only if "some inevitable occurrence shall interpose and prevent the rendition of a verdict (U. S. *v.* Shoemaker, 2 McLean, 114). The discretion of the Court in reference to such a discharge is "a legal discretion, and to be exercised according to known rules" (McKee's case, 1 Bailey, So. Car., 651; Mount *v.* State, 14 Ohio, 804), "a discretion to be used only under very extraordinary and striking circumstances" (2 Gall., 364). Such a discretion cannot be absolute and irreviewable, for then there would be no protection against its wildest abuse, and it is a rule in criminal proceedings that nothing be done within the discretion of the Court to the prejudice of the defendant (U. S. *v.* Shoemaker, 2 McLean, 114), and in fact in almost all of the cases cited below in treating of "jeopardy," the very character of the discussion shows, even where it is not directly asserted, that the Court of error exercised the right to review the action of the Court below in dis-

charging the jury; see also U. S. *v.* Shoemaker *supra*, where it is said "the first trial might be considered an experiment to draw forth the evidence in the case and ascertain if it be insufficient whether, on another trial, it might not be made strong enough to convict—nor could this right be safely exercised under the discretion," *i. e.*, an unlimited discretion of the Court. What shall govern this discretion?" And as to the position of the accused "a right which depends on the will of the magistrate is no right at all" (O'Brien *v.* Comm., 9 Bush (Ky.), 333).

The true rule is that the finding of the facts on which the discharge of the jury is based by the Court below is final, but the determination whether such facts constitute a case of necessity is a question of law and open to review when such facts appear upon the record.

> "If the Judge, having improperly discharged the jury, still refuses to let the prisoner go, but holds him for another trial, does an appeal lie from his discretion to a revising tribunal? The general doctrine in other cases is that when a matter concerns the dispatch of business, and is of pure discretion, the steps of the trial are not subject to review—a doctrine, however, not strictly held in all the States. But a claim, under the Constitution, to be exempt from a second jeopardy is not in reason within this class of questions, though in some of the cases observations occur indicating that the judges inconsiderately assumed it to be. Moreover, we have the distinction that the finding of a fact by the Judge is final, while the decision of a question of law is open to review. Hence, it would seem that when the Court concurs with the jury in the conclusion that they cannot agree, and, therefore, discharges them, the propriety of the discharge, under the circumstances, cannot be reviewed; but when the question of law arises whether there was a jeopardy or not, it may be re-examined on appeal, or writ of error, or a plea of former acquittal, according to the practice of the tribunal and the nature of the case."
>
> 1 Bishop Criminal Law, Sec. 1041.

Ned *v.* State, 7 Porter (Alabama), 186, 210.

In the State *v.* Nelson, 26 Indiana, 366, the question arose whether discharge of jury when they cannot agree is a bar to another trial, and although the Supreme Court of Indiana held that in the case of the inability of the jury to agree, such a discharge was not a bar, and although they could not adopt the interpretation of the constitutional expression as to twice in jeopardy which prohibited a retrial after the discharge of the jury except in cases of violent physical necessity, yet the Court says: "It does not follow that the defendant may not avail himself of any abuse of discretion by the judge in the discharging the jury without sufficient cause. The circumstances may always be made matter of record, and unless a proper case is shown to justify the action of the Court the discharge will be held equivalent to a verdict in favor of defendant."

In the case of State *v.* Bass, 82 No. Car., 570, it was held that in all crimes except capital, the presiding judge has the discretion to discharge a jury before verdict and that his action is not reviewable. But this case arose on discharge of jury for failure to agree, under which circumstances the right is not denied. Besides, the facts did not appear of record and the decision amounts to but this, that when the facts do not appear of record it will be presumed that they were sufficient to warrant the Court in discharging the jury, for the case of State *v.* Wiseman, 68 No. Car., 203, is therein cited and distinguished, and this last-mentioned case holds that while the findings of fact of the Court below are conclusive and not the subject of review, the judge's decision upon the law arising upon the facts may be reviewed and reversed.

The discretion of the Court in the discharge of a jury must be exercised upon evidence and the judgment on this must be shown in the record so as to render it open for review; otherwise the matter depends upon the arbi-

trary discretion of the judge (People agst. Cage, 43 Cal., 323).

> "It is not at all times within the discretion of the Court to stop the prosecution and still hold the accused to answer to the same offense."
> State *v.* Calendine, 8 Iowa, 288.

"Discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor. It must not be arbitrary, vague and fanciful, but legal and regular," per Lord Mansfield, in Rex *v.* Wilkes, 4 Burr., 2527, 2539, to be exercised not capriciously but on judicial grounds, per Jessel, *M. R.*, *in re* Taylor, 4 Ch. D., 160, and Lord Blackburn in Doherty *v.* Allman, 3 App. Ca., 728, "according to his discretion means according to the rules of reason and justice, not private opinion." Rooke's Case, 5 Rep., 100a; Keighley's Case, 10 Rep., 140d; Lee *v.* Bude, Ry. Law Reports, 6 C. P., 576; State *v.* McKee, 1 Bailey (So. Car.), 651, 654. From all of which it appears that whether discretion is properly exercised or is abused is a question of law when the facts upon which it is based are given, and many of the cases in which it seems to be implied that the discharge of the jury before verdict is within the unreviewable discretion of the trial Judge, are to be explained on the same ground on which formerly the reception or rejection of evidence was said to be in the discretion of the judge, namely, because their were no bills of exception or other mode by which the facts found or evidence offered could appear on the record, and in such cases it was always presumed that the Court was warranted in deciding as it did.

There are many cases in which the discharge of the jury before verdict is recognized as proper, *e. g.*, inability to agree upon a verdict, insanity or death of a juror, and some others which can be recognized by the distinction stated in U. S. *v.* Shoemaker, 2 McLean, 114, 117, 119. "In the former case," *i. e.*, when the discharge is proper

and will not act as a discharge of the accused, "the trial cannot proceed, no legal verdict can be rendered and defendant, alike with the government, must submit to the law of necessity, but the latter cases," *i. e.*, when the discharge will act as an acquittal of the accused, "are like the entry of a *nolle prosqui* and are imposed by no necessity, it may be a matter of discretion — founded upon no fixed principle or guided by no known rule or by a policy which may have for its object the oppression and conviction of the defendant."

And this Court speaks of a class of cases where the discharge of the jury before verdict does not prevent a second trial, and specifies where the jury cannot agree, or the verdict is set aside on the motion of the accused, or the indictment is found to describe no offense known to the law (*Ex parte* Lange, 18 Wall., 163, 173, *et seq.*)

The accused, on the discharge of a jury before verdict, unless some inevitable occurrence interposes and prevents its rendition, is entitled to his discharge and acquittal on the ground of the constitutional provision that no one shall be twice put in jeopardy for the same offense.

This brings us to the question of what constitutes legal jeopardy.

The great majority of the authoritative text writers hold that when the jury, being full, is sworn and added to the other branch of the Court, and all the preliminary things of record are ready for trial, the prisoner has reached the jeopardy, from the repetition of which our constitutional rule protects them (1 Bishop Crim. Law, Sections 1015, 1019).

Cooley on Constitutional Limitations (6th Edition), page 399:

> "A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient

> in form and substance to sustain a conviction, and a jury has been charged with his deliverance. And a jury is said to be thus charged when they have been impanelled and sworn. The defendant then becomes entitled to a verdict, which shall constitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosqui*, entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause."
>
> And see also Bigelow on Estoppel (5th Ed.), page 89.

And the same interpretation of legal jeopardy is sustained by the great majority of judicial authorities.

> "Jeopardy attaches the moment the jury is sworn, and if the jury thereafter be discharged without a verdict where no legal grounds of discharge is shown, the effect will be precisely the same as if a verdict of acquittal had been rendered."
>
> Mitchell *v.* State, 42 Ohio State, 383, 393, and cases cited therein.

To the same effect are the decisions in the following States:

Nolan *v.* State, 55 Ga., 524.
Lovett *v.* State, 80 Ga., 255, 256.
State *v.* Calendine, 8 Iowa, 288.
State *v.* Tatman, 59 Iowa, 471.
Josephine's Case, 10 George (Miss.), 613.
Teat *v.* State, 53 Miss., 439.
People *v.* Barrett, 2 Caines, 100, 304.
King *v.* People, 5 Hun, 297.
Comm. *vs.* Cook, 6 S. & R. (Penn.), 577.
Comm. *vs.* Fitzpatrick, 121 Pa. St., 109.
Hilands *vs.* Commonwealth, 111 Pa. St.
McCorkle *v.* State, 14 Ind., 40.
Adams *v.* State, 99 Ind., 244.
Powell *v.* State, 17 Tex. App., 345.

"Respondent was in jeopardy as soon as first jury was sworn."

People *v.* Gardner, 62 Mich., 307, 311.

"If the attorney for the State after the introduction of the testimony for the prosecution had, by leave of the Court, entered a *nolle prosequi*, is there any doubt but that it would have resulted in the prisoner's acquittal? And if so, must not the discharge of the jury by the Court, under like circumstances, have the same effect? It certainly would" (O'Brien *vs.* Comm., 9 Bush (Ky.), 333).

Comm. *v.* Smith, 149 Mass., 7.
Lee *v.* The State, 26 Ark., 260.
People *v.* Cage, 48 Cal., 323.
Ex parte Snyder, 29 Missouri App., 256.
State *v.* McKee, 1 Bailey (*So. Car.*), 651 (1830).

The last cited case contends that taking the decisions of the United States Supreme Court with those of New York and England, and of that State (South Carolina), a jury after they are charged can be discharged and the prisoner tried a second time for the following causes only: 1st, Consent of prisoner; 2d, Illness of one of the jurors, the prisoner or the Court; 3d, Absence of one of the jurymen; 4th, The impossibility of their agreeing upon a verdict.

And in the language of the Court in Nolan *v.* State, 55 Ga., 521, to say that jeopardy does not begin until after verdict, is like saying that man in a battle is not in danger until he is struck.

And the constitutional provision as to jeopardy is practically and wisely by an equitable interpretation applied by the courts to all indictable offenses including misdemeanors, *ex parte* Lange, 18 Wall., 163, 169, and following: 1 Bishop Crim. Law, Section, 990, 991; 1 Chitty Crim. Law, 452, 462.

We think the language of the cases can be reconciled, including even those where it is held that jeopardy does

not begin until after a verdict. For even without the constitutional provision the accused should be protected from an unwarranted discharge of the jury; while all the cases recognize certain circumstances under which the discharge before verdict is properly allowed. The practical difference, therefore, between the two rules as to whether jeopardy begins before or after verdict is that under the first the State should show some legal necessity or consent of the accused to the discharge, while under the second the accused must show previous verdict or bring himself under exception by showing an illegal discharge of the jury.

In the case at bar the withdrawal of a juror was on the motion of the District Attorney (Rec., p. 14), and was of the nature of an attempt to obtain a new trial on the part of the Government which could not have been procured by a direct motion therefor or after an entry of a *nolle prosequi*. The Court below did not find the fact from the conflicting affidavits cited above as to whether or not the juror Goodnow had sworn falsely on his *voir dire* and was acquainted with accused and so did not base its decision on such fact, but only that the knowledge of the statement made by Ward (Record, p. 22) was conveyed to the jury by the publication of the letter (Record, p. 15) of the defendant's counsel and that such a publication under the peculiar circumstances (which circumstances are all of record) afforded a sufficient ground for discharging the jury (see decision on motion to discharge jury, Record, pp. 29, 30). That a jury can be discharged for such a cause finds no support from the decisions or text writers. Only when the retention of the existing jury might prejudice the accused and afford ground for a motion for a new trial on his behalf would a discharge under such circumstances be allowable; but the reading by the members of a jury of newspaper comments and criticisms upon the conduct of a trial, or upon any of the parties or integral parts of the

Court, now that we allow the jury freely to separate during the trial, has long since ceased to be a reason why a new trial should be granted the accused. With how much less reason should it be allowed to furnish in an indirect way and by a motion to discharge the jury, grounds for granting a new trial to the State? The "trial by newspaper," especially in every important case, progresses day after day during the continuance of the legal trial, and it is marked by prejudice, passion, and, at least, by the absence of the safeguards that the law considers so essential to the protection of the rights of the accused, often with violence, and directs attacks upon him. But no motion for a new trial is granted for such a cause. The only remedy, if any, is an action for contempt against the print or its author.

United States *v.* Reid, 12 Howard, 361.
State *v.* Jackson, 24 Pacific Rep., 213.

Besides, the accused in this case had waived any right to move for a new trial on the ground of what had taken place in respect to the jury by declaring himself satisfied with that jury and by objecting to its discharge.

Even where there is a cause of challenge existing against a juror and not discovered until after the trial has begun, there is no ground for a new trial, unless the defendant is prejudiced thereby.

State *v.* Williams, 14 W. Va., 851.
State *v.* Davis, 80 No. Car., 412.
Cannon *v.* State, 57 Miss., 147.

The former decisions of this Court and of the Federal courts are not averse to our contention.

The question arose in U. S. *v.* Perez, 9 Wheaton, on the right to discharge a jury when they are unable to agree upon a verdict, but almost all the cases recognize this as a sufficient reason, and as a necessary exception to the rule; all else in that case was *obiter dicta* and not controlling; besides, it cannot be said that the Court therein refused to review the action of the trial Court.

In U. S. *vs.* Haskell, 4 Wash. C. C., 402, the decision was only against the form in which the question was presented to the Court, for it is stated therein, "by reprobating this plea we do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal."

In U. S. *vs.* Morris, 1 Cur., 23, the decision turned upon the fact that the Circuit Court had no power to review the judicial determination of the trial Judge, under the guise of passing upon the special plea of former jeopardy, that the trial Court had jurisdiction, and that there could be no judicial inspection behind the judgment of such a Court save by *appellate power*, which power the Supreme Court of the United States now has; and it also has before it, what could not have been had in many of the cases cited, a record which includes a bill of exceptions.

See also

U. S. *v.* Shoemaker, 2 McLean, 114.
Kelly *v.* U. S., 27 Fed. Rep., 616.
Ex parte Ulrich, 42 Fed. Rep., 587,

in which last case the accused was discharged because of the discharge of the jury before verdict, even though the Court in its opinion states that the Constitution of Missouri provides "— the Court may in its discretion discharge the jury."

In ex parte Bigelow, 113 U. S., one phase of the same question was upon the record, but this Court held it had no jurisdiction on other grounds and as it distinctly said, without intimating any opinion whether the Court below rightly held as to the effect of the discharge of the first jury therein.

U. S. *v.* Watson, 3 Benedict, 1:

Motion was made on minutes of Court to discharge defendant on ground that discharge of jury before verdict was equivalent in law to an acquittal of the defendant on a trial of the indictment. Blatchford, *J.*, said: "When

the trial of an indictment has been commenced by the swearing of the jury the defendant is in their charge and is entitled to a verdict of acquittal if the case on the part of the prosecution is for any reason, not made out against him, unless he consents to the discharging of the jury without giving a verdict or unless there is such a legal necessity for discharging them as would, if spread on the record, enable a court of error to say that the discharge was proper."

As to the English decisions it is enough to say that they are of no authority with us, except so far as they may help to show what was the common law in the State of New York (in the Southern District of which State plaintiff in error was tried), in the year 1789, assuming that the decision in U. S. *v.* Reid, 12 How., 361, as to certain parts of the procedure in criminal cases, can be of help to us here. In Pennsylvania the authority of English decisions, down to July, 1776, is allowed, and in commenting on this Tilghman, *J.*, in Comm. *v.* Cook, 6 S. & R., 577, says: "I am not aware of any established principle of English law at that day by which the Court could discharge a jury merely because they could not agree," *a fortiori* not for any less cause. We think the same statement could be made as to the English decisions down to 1789, nor can we, prior to this latter date, find any principle in the New York practice and procedure that modifies the then existing English rule.

The discussion above set forth applies in large part also to the error assigned for not permitting the plea of former jeopardy to be filed when offered before the impaneling of the second jury.

The plea of former jeopardy may be interposed even after the jury have been impaneled, and a plea of not guilty entered, and it is error to strike it out on ground that it was filed too late after plea of not guilty entered.

Pizano *v.* State, 20 Tex. App., 139.

The language used by the Court below to the jury on their coming in and asking to be discharged (Rec., p. 60) is error for which the judgment herein should be reversed.

It is not denied that in the Federal courts the trial Judge in submitting a case to the jury may express his opinion upon the facts.

But it will be found from an examination of the authorities that the tendency is to confine the right of the Court in this respect within well-defined limits, and that in criminal cases especially such an expression of opinion must be closely coupled with words giving the jury to understand that they are not to be bound by it, but that the determination of all matters of fact was within their province alone.

> The Federal Judge "may sum up the facts to the jury, as the English judges are in the habit of doing, and submit them to the judgment of the jury, together with proper instructions as to the inferences of law deducible therefrom; but he should, in *all* cases, *take care* to separate the law from the facts, and to leave the latter, in unequivocal terms, to the judgment of the jury as their true and peculiar province."
>
> 2 Thompson on Trials, Sec. 2293.
>
> McLanahan *v.* Universal Ins. Co., 1 Pet., 170, 182.

> "The Circuit Judge also erred in pointing out particular testimony and instructing the jury if they believed it 'that it was pretty strong evidence,' and 'very strong evidence in favor of the guilt of the accused.' And with reference to some of the evidence, that 'it is evidence, at least, that I should not fail to act upon if I was on the jury.'"
>
> People *v.* Gastro, 75 Mich., 127.

In regard to this error, the Court says (bottom of page 132):

> "While we have held that a Circuit Judge may express his opinion upon the weight to be given to certain testimony, where he, at the same time, fully

instructs the jury that they are the exclusive judges of the weight of the testimony, yet the tenor of our decisions is to the effect that it is not a practice that should be generally indulged in, and many cases have been reversed upon this ground."

Citing

Pettit *v.* Sherer, 17 Mich., 48.
Knowles *v.* People, 17 *Id.*, 408.
Walsh *v.* Ware, 32 *Id.*, 77.
Blackwood *v.* Burns, *Id.*, 104.
Richards *v.* Fuller, 38 *Id.*, 653.
Hall *v.* People, 39 *Id.*, 717.
Beurmann *v.* Van Buren, 44 *Id.*, 496.
People *v.* Lyons, 49 *Id.*, 78.

"A Court may not only present the facts proved, in their charge to the jury, but give their opinion as to those facts, for the consideration of the jury. But, as the jurors are the triers of facts, such an expression of opinion by the Court should be so granted as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction was not given as a point of law, by which they were to be governed, but as a mere opinion as to the facts, and to which they should give no more weight than it was entitled to."

Tracy *vs.* Swartwout, 10 Pet., 80, 96.

The language used by the Trial Judge herein was virtually not an expression of opinion but a direction in point of law. See the precedent in Money *v.* Leach, 3 Burr., 1742, 1750: "And the said Chief Justice did then and there declare and deliver his opinion to the jury, that the said several matters so produced and proved on the part of the defendants were not, upon the whole case, sufficient to bar the action and, with that opinion, left the same to the said jury." This was made one of the grounds of error, and it was never doubted that the opinion of the Chief Justice as above stated was taken and received as a direction in point of law.

And Chancellor Kent held that the charge "that the

several matters given in evidence on the part of the plaintiffs were, in his opinion, conclusive evidence of, &c.," was more than an expression of opinion which it was proper for the Court to give, but a positive direction in point of law, and that the judgment should be reversed therefor; and cites and enlarges on the case from 3 Burr., *supra*.

New York Firemen Ins. Co. *v.* Walden, 12 John., 513, 517 *et seq.*, and cited in Tracy *v.* Swartwout, *supra*.

McLanahan *et al. v.* Universal Ins. Co., 1 Pet., 170, 182.

In a criminal case the Court cannot direct a verdict of guilty, even where the facts are admitted beyond dispute, and the question of guilt or innocence depends wholly upon a question of law, which the Court must determine.

United States *vs.* Taylor, 11 Fed. Rep., 470.

In Section 2287, page 1638, of 2d Thompson on Trials, after reviewing the effect of the statutes of the States upon the right of the Court to comment upon the evidence in a criminal case, the author says:

> "But under *any* theory of the relative province of court and jury, where there are questions of fact for the determination of the jury, *it is error*, even in those jurisdictions, where the Court is allowed to sum up the evidence, to give a charge which *virtually* decides questions of fact and withdraws them from the consideration of the jury."

Citing

Ranney *v.* Barlow, 112 U. S., 207.
Adams *v.* Roberts, 2 How., 486.
Rees *v.* Beck, 24 Alabama, 651.
Grub *v.* Nichols, 36 Ills., 92.
Chappelle *v.* Allen, 38 Missouri, 220.

The Court should not instruct upon the sufficiency of the evidence, and an instruction from the Court in a criminal prosecution that the evidence will justify con-

viction is erroneous. The question of sufficiency is to be decided by the jury.

U. S. *v.* Fenwick, 5 Cranch C. C., 562.
Chesapeake & Ohio Canal Co. *v.* Knapp, 9 Peters, 541, 568.

In 2 Thompson on Trials, Sec. 2294, page 1645, note 2, the author says:

> "But it is laid down that in such cases (*i. e.*, where the Court gives his opinion upon the facts) the Judge must accompany such commentaries with explicit instructions that it is the duty of the jury, notwithstanding, to consider the evidence and decide as they think the truth requires."

Citing

Gardiner *v.* Pickett, 19 Wendell, 186.
Alice *v.* Leonard, 58 New York, 288–292.

> "To be free from the legal objection, it must be advisory merely, and must not be put in the form of a direction as a matter of law."

Citing

Alice *v.* Leonard (*supra*).
People *v.* Rathbun, 21 Wendell, 509.

Even if the construction in a criminal case is ambiguous, so that conclusions clearly prejudicial to the defendant may be drawn therefrom by the jury, it is erroneous.

People *v.* Maxwell, 24 Cal., 14.

It cannot even be claimed that the expressions used by the Court and assigned as error herein, viz.: "I cannot understand the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. Wherever, in the opinion of the Court, the testimony is convincing, it is the duty of the Court to hold the jury together" (Record, p. 60) are ambiguous, and may mean that the evidence is insufficient for conviction, or that the testimony is convincing that the defendant is not guilty, for then it would have been the duty of the Court to have directed

an acquittal of its own motion. Nor can the words "based upon the insufficiency of the evidence" mean the insufficiency of the evidence for acquittal, for the Government having the affirmative of the issue in a criminal case, no question can arise as to the insufficiency of the evidence to acquit; the evidence must be sufficient to convict, and if it be not, acquittal must follow. From which, moreover, it follows that the above instruction was equivalent virtually to telling the jury that they would be held together until they found a verdict of guilty. This was a species of duress, and was in itself well calculated to affect the minds of the jury adversely to the interests of the accused, and so error.

The remarks of the Judge herein assigned as error were unqualified and were made on the day following that upon which the main charge was delivered (see Record, pp. 47 incl. and 60, fol. 116).

And the error would be the same even if no evidence was offered by the defendant.

"By his plea of not guilty, the defendant must be understood as denying the truth of the indictment, and as not conceding the truth of what the witnesses for the Government have sworn to. This is so notwithstanding the fact that no witnesses for the defendant contradicted the statements of the witnesses for the prosecution * * * It was within the province of the jury to disbelieve the witnesses for the Government."

United States *v.* Taylor, 11 Fed. Rep., 470, 471.

All of which is respectfully submitted.

SAMUEL SHELLABARGER,
JOHN JAY JOYCE,
Of Counsel with Plaintiff in Error.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

JAMES A. SIMMONS, PLAINTIFF in error,
vs.
THE UNITED STATES.
} No. 1296.

ERROR TO THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

W. H. H. MILLER,
Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

JAMES A. SIMMONS, PLAINTIFF in error,
vs.
THE UNITED STATES.
No. 1296.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiff in error was indicted in the circuit court for the southern district of New York, under section 5209, Revised Statutes, for aiding and abetting one Claassen in embezzling and misapplying the funds of the Sixth National Bank of New York. He was arraigned, pleaded not guilty in January, 1891, was brought upon trial before a jury, witnesses sworn and examined, and the case proceeded until the 9th day of February. On that day evidence was brought to the attention of the court and of the district attorney tending to show that one of the jurors who had testified on his *voir dire* that he had no acquaintance with the defendant, in so testifying, had not stated the truth, but that, some years before, he and the defendant had occupied adjoining rooms and had relations of a more or less intimate acquaintance.

These facts becoming public and appearing in the public prints, and the court, being satisfied that he had not an impartial jury, on the motion of the district attorney, discharged the jury, the defendant objecting and excepting. Thereupon the defendant moved the court for an acquittal, which was denied, and the case was reset for trial on the 12th day of February, 1891. On that day defendant moved the court for permission to file a plea in bar, setting forth the foregoing facts as being a "former jeopardy." This motion was denied. The trial proceeded and on the 11th day of March resulted in a verdict of guilty and on the 26th of June a sentence of imprisonment for a period of six years in the Erie County penitentiary. In the specification of errors, commencing on page 5 of the brief for plaintiff in error, several alleged errors are set forth, but only two of these are argued in the brief, and none others, therefore, are noticed.

First, the action of the court in refusing to discharge the prisoner as having been once in jeopardy and in pursuance of such refusal retrying him.

Second, that the court erred in its instruction to the jury, in that it is claimed the court usurped the functions of the jury in commenting upon the facts.

I.

As to the first question, namely, that arising out of the alleged former jeopardy, it seems to me there are two complete answers.

(*a*) At the time the proceedings were had at the first trial no appeal or writ of error was allowable by statute from the circuit court. The action of the circuit judge in the premises was final and conclusive. The subsequent giving of a writ of error, by the act of March 3, 1891, providing for an appellate court, can not retroact so as to give to this court a revisory power over the proceedings of the circuit court prior to that date. This case is here because the second trial, verdict, and judgment were subsequent to the act of March 3, but this court can only revise the proceedings subsequent to that date. Any other revision would necessarily be collateral. In short, what transpired on the first trial can be reviewed in this court only as it could be reviewed on a writ of habeas corpus, and that brings the case exactly within the decision in *Ex parte Bigelow* (113 U. S. R., 328). There, as will be remembered, the petitioner was in court, under fourteen separate indictments for embezzlement, in the supreme court of the District of Columbia. The court made an order consolidating the indictments and the defendant was placed upon trial under a plea of not guilty upon all of said indictments. After the trial had progressed for some time the court concluded that the trial ought to be upon the indictments separately and discharged the jury. Thereupon the defendant demanded a judgment of acquittal, which was refused. He was placed upon trial, under one of the indictments, convicted, and sentenced, and filed his petition for a writ of habeas corpus. It was held by this court that the supreme court of the District, having jurisdiction of the person and the subject matter, its action in

the premises was not reviewable. It is not seen how a different ruling can be applied to the case at bar.

(*b*) But if the statute giving a writ of error antedated this first trial, the conclusion would not be different. The action of the court in discharging the jury was the exercise of a discretion, which, according to the decisions of this court, the circuit courts, and the English courts, is not reviewable. It is conceded in the brief for plaintiff in error, and is the settled law that for certain causes a jury may be discharged without the discharge operating as an acquittal of the prisoner. What these causes are, which are generally classified under the head of "necessity," must of course, vary with the cases. This being so, it is of course, necessary for the court, in order to make the order discharging the jury, to find the existence of facts necessitating such discharge. Indeed, the discharge implies the existence of the facts. Nothing is better settled than that, when a court of general jurisdiction performs an act whose legality requires the finding of the existence of certain facts, it will be conclusively presumed that these facts were found. See *Grignon* v. *Astor* (2 Howard, 339). But if the existence of such facts may be brought in review in an appeal upon another trial, then the issue so raised may be submitted to a jury, and we have an anomaly of impaneling a jury to review the action of the court in the exercise of a discretion. But it is hardly worth while to elaborate this argument. The whole subject has been discussed with characteristic ability by Mr. Justice Curtis, of this court, in a case of precisely the same character as the one now under consid-

eration. (*United States* v. *Morris*, 1 Curtis, 23.) The discussion upon this particular question commences on page 33.

A like discussion resulting in the same conclusion may be found in *Windsor* v. *The Queen* (Law Reps., 1st Q. B., 289). In both of these cases, also, in addition to holding that the action of the court in discharging the jury is not reviewable, it is also held that such action does not operate as an acquittal. In the English case, the jury was discharged after the case had been committed to the jury and they had been in deliberation for five hours for the reason that the case could not be concluded before Sunday. The case was very fully discussed, several of the judges giving opinions resulting unanimously in the conclusion before stated.

In the *United States* v. *Perez* (9 Wheaton, 579), which was a capital case, the jury were discharged because of inability to agree, and an acquittal was claimed. The court says:

> We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful

> how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office.

In the *United States* v. *Coolidge* (2 Gallison's Reps., 363), a witness declining to be sworn, the Government's case was liable to fail, and the jury was discharged on the motion of the district attorney. The defendant objected, and Mr. Justice Story held that the discharge was proper and had not operated as an acquittal. His opinion was as follows:

> The question is simply this. A party is on trial before a jury, and a circumstance occurs which will occasion a total failure of justice if the trial proceeds; have the court, in such an emergency, power to withdraw a juror? It has been stated from the bar that in capital cases the court have not this power; but in a case in Foster's Crown Law, and in several other cases, it has been held that they have. In misdemeanors there is certainly a large discretion, and until the cases just mentioned capital trials were generally supposed to be excepted. It is now held that the discretion exists in all cases, but is to be exercised only in very extraordinary and striking circumstances. Were it otherwise, the most unreasonable consequences would follow. Suppose that in the course of the trial the accused should be reduced to such a situation as to be totally incapable of vindicating himself, shall the trial proceed and he be condemned? Suppose a juryman taken suddenly ill and incapable of attending to the cause, shall the prisoner be acquitted?

> Suppose that this were a capital case, and that, in the course of the investigation, it had clearly appeared that on Lee's testimony depended a conviction or an acquittal, would it be reasonable that the cause should proceed? Lee may, perhaps, during the term, be willing to testify. Under these circumstances, I am of opinion that the Government is not bound to proceed, but that the case be suspended until the close of the term, that we may see whether the witness will not consent to an examination.—Davis, J., concurred.

In *United States* v. *Haskell* (4 Washington) Mr. Justice Washington allowed a jury to be discharged because one of the jurors had become insane. Upon a very full consideration he held that upon another trial a plea of the former jeopardy was not admissable; that the discharge was right, and that the question of the propriety of the discharge was in the discretion of the court. See also *United States* v. *Shoemaker* (2 McLean, 114), and *United States* v. *Gibert* (2 Sumner, 19).

A like conclusion was reached, upon great consideration, by a unanimous court, in the case of the *Queen* v. *Charlesworth* (1 Best & Smith, 460). In this case also the jury was discharged because of the refusal of a witness to testify and it was held that the discharge was authorized by law and had not operated as an acquittal of the prisoner.

We thus have the opinion of the court of Queen's Bench in England, decisions by Mr. Justice Washington, Mr. Justice Story, Mr. Justice McLean, Mr. Justice Curtis, of this court at circuit, and the decision by this court, all holding that the discharge of a jury lies in the discretion

of the court, and in two or three of the cases, on great consideration, further holding that such exercise of discretion is not reviewable, either directly or collaterally.

Nor do the cases cited for the plaintiff in error establish a different doctrine. In *People* v. *Goodwin* (18 Johnson, 205), quoting Mr. Chanceller Kent, in the case of the *People* v. *Olcott* (2 Johns. cases, 301), Chief Justice Spencer says:

> All the authorities admit that when any juror becomes mentally disabled by sickness or intoxication it is proper to discharge the jury; and whether the mental inability be produced by sickness, fatigue, or incurable prejudice, the application of the principle must be the same. * * * Every question of this kind must rest with the court, under all the particular or peculiar circumstances of the case; there is no alternative; either the court must determine when it is requisite to discharge, or the rule must be inflexible that after the jury are once sworn no other jury can, in any court, be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity and to determine what combination of circumstances will create one.

In *Nolan* v. *Georgia* (55 Georgia Reps., 521), after trial the verdict was received in the absence of the prisoner, he being in jail. This verdict was on his application set aside and it was held that it was a case of once in jeopardy. The court in this case says, speaking of the necessity of discharging the jury, "what amounts to such legal necesssity as will justify the discharge of a jury without a verdict, is a subject on which courts have

widely differed" (citing numerous cases from Indiana, and a case from Arkansas and two from Ohio). "The tendency of late has been to lower the standard so as to comprehend moral as well as physical necessity, and in the region of the moral, to be content with very moderate tests. See the cases cited in the syllabus. Mistrial, from inability of the jury to agree, is clearly within the principle. So, too, is the case of voluntary absence by the prisoner when he ought to be present." It is then stated, however, that none of the cases, nor does the principle in that opinion of the court, include the reception of the verdict in the involuntary absence of the prisoner.

In *Dobbins* v. *State* (14 Ohio, 493), the court decided that after a reasonable allowance of time for the jury to agree to a verdict, it was proper to discharge the jury, and that such trial should not be pleaded in bar of a subsequent trial. In considering the general principle by which they arrived at this conclusion the court makes use of the following expression:

> There is probably now no country in the world, where the jury trial is employed, that the State acknowledges its inability to punish crime because insuperable obstacles have intervened to prevent a result upon the first attempt at a trial. On the other hand, it is perfectly well settled that where the State intervenes, without such necessity, and prevents a verdict, the accused can not be subjected to a further trial consistently with the Constitutional guaranty that he shall not "be twice put in jeopardy for the same offense." It is the right of the State, and one of the most solemn and responsible of its duties, to punish

> crime; and it is the absolute right of anyone accused of crime to demand "a speedy public trial by an impartial jury," and a verdict, declaring his guilt or innocence, according to the due course of law. The one is indispensably necessary to the safety of the community and the preservation of peace and order, and the other for the protection of the innocent, and to prevent the oppression which might otherwise be practiced by those having charge of State prosecutions. The problem has always been to preserve intact both of these important rights. * * * If a verdict can not be obtained upon one trial, another may be lawfully had, and the unavoidable delay which ensues is the fault of no one.

In the same case, speaking of the fact that the necessity need not be shown in evidence, but that the court will take cognizance of the fact, the court says.

> If a juror or the accused were to fall in a pit, it would not need a witness to inform the court of the fact, nor to justify an order arresting the trial and discharging the jury.

In *Watkins* v. *The State* (60 Georgia, 601) it is held that it was no error to discharge a jury after they had been sworn, where it was discovered that two of the jurors had been members of the grand jury which had found the indictment, and that such discharge did not operate as an acquittal of the defendant.

So in the *State* v. *Tatman* (59 Iowa, 471), all the evidence being in, the judge on receiving a telegram of the serious illness of his wife adjourned court until the following Friday, and on that day his wife being still ill, he adjourned until the next term, his wife dying. Held by

the Supreme Court that the defendant had not been in jeopardy and might be retried.

These cases from the State courts are either cases cited by the plaintiff in error or from the same State from which their citations are made, and they all go to show the correctness of our contention, that the propriety of the discharge of the jury is for the court, and that the necessity may be moral as well as physical.

In the case of the *State* v. *McKee* (1 Bailey S. C., 651), McKee was indicted for the murder of a slave. The jury was impaneled, evidence given, and the jury charged, and the argument in process, when it appeared that the foreman of the jury had stated that he would not convict any white man for the murder of a slave. The prosecutor for the State then entered a nolle pros., and the jury was discharged. At a subsequent day of the term, the case came up on a motion to discharge the prisoner on the ground that the nolle pros. amounted to an acquittal. The judge inclined to the opinion that it did, but sent the case up to the court of appeals for a more authoritative opinion. The court decided there that at that stage of the proceedings the prisoner was in jeopardy and that the entry of a nolle pros. operated as an acquittal.

In my opinion this case and the Cook case from Pennsylvania, both cited by counsel for plaintiff in error, are exceptions to and contrary to the current of authority in the State courts.

II.

The next point made is on the language used by the court to the jury when they came in and asked to be discharged. That language is as follows:

> This case has occupied a long time. It is a case of importance, and the discharge of the jury at this time would involve another trial. It seems to me that that should not be had unless in a case of necessity. I see in this case no such necessity. I can not understand that the failure to agree arises from any difference of opinion based upon the insufficiency of the evidence in this case. Wherever, in the opinion of the court, the testimony is convincing, it is the duty of the court to hold the jury together. Therefore I must decline your request to be discharged. I shall be unable to remain in this building during the day, having to hold court elsewhere, but I will direct that word be sent to me when you do agree, and whenever you agree send me word by a messenger, and I will be present to receive your verdict. Follow the officer.

The objection made is that in this language the court assumed that the evidence was sufficient to convict, and thereby usurped the functions of the jury. What was there said by the court must be taken in connection with the instructions given by the court when the case was first submitted to their consideration. A careful examination of that charge, extending from page 47 to 58, inclusive, will impress the court with its ability and fairness. In the beginning the court says:

> I have the right, under the laws of the United States, to give you my opinion on questions of fact,

but I refrain from doing so, because I am well satisfied of your capacity to understand what has been testified to in all these days that we have been here engaged. I shall confine myself to stating to you the law by which you are bound, simply calling your attention to the questions of fact, *which are to be decided by you; for, as you know, juries decide questions of fact, and not the court.*

Nothing could be more clear as a statement of the exclusive function of the jury in dealing with the question of fact than this, and the learned judge seduously adhered to the purpose so declared throughout his entire charge. So clear is this that on page 59 the leading counsel for the prisoner states: "I think your honor has charged substantially our requests. They are quite voluminous, and it may be you have not charged them all." It thus appears that, listening to the original charge, the attorneys caught nothing worthy of exception. An exception is, however, taken on the same page to the alleged failure to give the twelfth, twenty-eighth, and thirty-first requests, but I do not find those requests anywhere set out in the transcript, and therefore infer that such exceptions are not relied on here. The sole question, then, remains whether the remarks by the court to the jury when they were brought in on the 11th of March were unauthorized. The judge expresses no opinion as to what the decision ought to be. He simply expresses an inability to understand that the failure to agree results from a difference of opinion as to the insufficiency of the evidence, and that wherever in the opinion of the court the evidence is convincing it is his duty to hold the jury together. It does not appear how

long the jury had been out. On page 59 it does appear that they came in for further instructions at 10:30 p. m. of the 10th, but at what time they went out originally does not appear. Since their last instruction they had been out a little over twelve hours.

It was certainly no abuse of discretion by the court to hold the jury together, and to have held them together without speaking the few sentences complained of would have implied everything embraced in those two sentences, namely, that in the opinion of the court it was a case where, upon the evidence, a verdict should be found, whether for the Government or the defendant would not then have appeared, nor does it from the language used. In view of the clearness with which the judge had impressed upon the jury that it was their exclusive function to find the facts, and especially in view of the fact that he had carefully avoided expressing any opinion, or using any expression indicating which way, in his view, the verdict should be, what is here said was in no degree erroneous or prejudical to defendant. But if it were conceded that this was an expression of opinion by the court as to the evidence it would not be error.

In *Transportation Line* v. *Hope* (95 U. S., 302), this court says:

> An expression of an opinion simply by the judge upon a question of fact is not ground of error.

So in *Games* v. *Stiles* (14 Peters, 326), Mr. Justice McLean, speaking for the court, says:

> The principle is well established that a court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and

> matters of opinion in regard to the facts. When a matter of law is given by the court to the jury it should be considered as conclusive, but a mere matter of opinion as to the facts will only have such influence on the jury as they may think it is entitled to.

So in *Insurance Company* v. *Rodel* (95 U. S., 232), on page 238, Mr. Justice Bradley, speaking for the court, says:

> The weight of the evidence is for them (the jury), and not for the judge, to pass upon. The judge may express his opinion on the subject and in cases where the jury are likely to be influenced by their prejudices it is well for him to do so, but it is entirely in his discretion. *Drakely v. Gregg*, 8 Wall., 242; *Hickman v. Jones*, 9 *id.*, 197; *Barney v. Schneider*, *id.*, 248, and numerous other cases.

It is confidently submitted that in this case the court did not overstep the bounds of the lines of his duty in the premises.

W. H. H. MILLER,
Attorney-General.